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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 240

H. T. ARNOLD, PETITIONER,

vs.

PANHANDLE AND SANTA FE RAILWAY CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS OF TEXAS, SEVENTH SUPREME JUDICIAL DISTRICT

PETITION FOR CERTIORARI FILED JULY 9, 1956

CERTIORARI GRANTED OCTOBER 8, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

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[fol. 1] [Caption omitted]

[fol. 2]

IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

No. 23280

H. T. ARNOLD,

vs.

PANHANDLE & SANTA FE RAILWAY COMPANY

To said Honorable Court:

PLAINTIFF'S ORIGINAL PETITION—Filed January 11, 1954

Now comes H. T. Arnold, hereinafter called Plaintiff, complaining of Panhandle & Santa Fe Railway Company, hereinafter called Defendant, and for cause of action respectfully shows unto the Court the following:

I

That Defendant, Panhandle & Santa Fe Railway Company, is a railroad corporation duly incorporated and operating a railway system extending into and through Lubbock County, Texas, and beyond and into and through other states; that said Defendant has an agent for service located in Lubbock, Lubbock County, Texas, where service of process may be had herein.

That Plaintiff, H. T. Arnold, is a resident citizen of Lubbock, Lubbock County, Texas.

II

That at all times mentioned herein Defendant, Panhandle & Santa Fe Railway Company, owned, maintained, operated and controlled a railway system including trains, cars, tracks, road bed, right-of-way, stations, land, appliances and other rolling stock and equipment in Lubbock County, and elsewhere in Texas, and into and through other states and was so engaged in operating said railway

system, trains and equipment and appurtenances thereto as a common carrier engaged in both intra-state and inter-state and foreign commerce hauling both freight and passengers for hire in furtherance of and substantially affected intra-state, inter-state and foreign commerce.

III

That Plaintiff, H. T. Arnold, entered the employ of Pan-[fol. 3] handle & Santa Fe Railway Company, approximately twenty-nine years prior to his accident as hereinafter alleged and remained steadily employed by said Defendant until his said accident and was at all times mentioned herein engaged in the due course and scope of his employment for said Defendant and under its direction, supervision and control until he suffered injuries as hereinafter alleged; that at all times mentioned herein he was engaged in the furtherance of intra and inter-state commerce.

IV

That heretofore, to-wit, at or about 9:15 o'clock in the morning of on or about January 16, 1952, the Plaintiff, H. T. Arnold, was engaged in the normal course and within the scope of his employment for said Defendant working in the yards of Defendant in Lubbock, Lubbock County, Texas; that as Plaintiff was inspecting cars and while walking from one car to the next for inspection purposes, and walking near the track on the Defendant's right-of-way he was struck and run over by a truck which backed into and over portions of his body; that said truck was used for hauling mail and other freight to the Defendant's trains and was on Defendant's property with full authority from Defendant Railway; that as said truck struck Defendant in the back he was knocked to the ground with a great deal of force and the truck wheels ran over various portions of his body causing him to suffer serious and painful injuries as hereinafter alleged; that the train cars that Plaintiff was in the process of inspecting at the time of his injuries were engaged, had been and would be in interstate commerce; that the work Plaintiff was doing at the time of his injuries was on and in connection with interstate passenger freight and mail service and said cars

and train were owned, operated and maintained by Defendant in the furtherance of intra-state and inter-state commerce.

V

That on the occasion in question Defendant, Panhandle & [fol. 4] Santa Fe Railway Company, its agents, servants, employees and vice principals were guilty of negligence towards the Plaintiff in each of the following respects:

A. In failing to furnish the Plaintiff a reasonably safe place to work.

B. It failed to warn Plaintiff of the truck in the immediate vicinity where he was working.

C. It maintained no flagman or person to protect Plaintiff while performing his duties for the railroad.

D. It failed to furnish and maintain a blue flag for Plaintiff.

E. It was negligent in that it permitted said truck to be operated in a careless and negligent manner in the vicinity of where Plaintiff was working.

F. It was negligent in allowing said truck to be driven on an area normally used as a walk way.

That each and all of said acts of negligence jointly and severally was a direct and proximate cause of the injuries received by the Plaintiff, H. T. Arnold, on the occasion in question.

VI

That as a result of the violent impact of said truck against Plaintiff's body and the running over of Plaintiff by said truck caused him to suffer and sustain severe, painful and permanent bodily injuries as hereinafter alleged.

Crushing injury to the cervical spine resulting in fractures to the 3rd, 4th, 5th and 6th cervical vertebra leaving a fragment of bone below the anterior inferior margin of the 6th cervical vertebra and leaving the body of the 6th cervical vertebra mashed into a wedge shaped mass of bone; compaction and jamming together of the dorsal spine resulting in lipping fractures to the 7th, 8th, 9th, 10th and 11th dorsal vertebra; crushing and compaction

injury to the lumbar spine resulting in lipping fractures to the 4th and 5th lumbar vertebra and displacement and [fol. 5] dislocation of the bones and joints in said area causing the articular facets to over-ride at the 5th interspace; compaction and jamming together of the lumbar spine resulting in reduction of the intervertebral space between the 5th lumbar vertebra and the sacrum causing herniation, rupture and damage to the disc of cartilage at said interspace; crushing injury to the right hand, wrist and arm causing fractures and leaving a round fragment of bone lying between the first metacarpal bone, said fragment being fractured from the first metacarpal bone and leaving irregularity of the base of the second metacarpal bone; that as a result of said injuries to Plaintiff's lumbar spine he has been caused to suffer extensive damage, injury and impingement of nerves and other soft tissues in said area causing him to suffer a partial paralysis of the lower extremities; that as a result of said injuries Plaintiff's back has become stiff and immobile with all attempted movement both bending and rotation attended with severe pain and muscle spasm; that as a result of said injuries and the pain and suffering incident thereto Plaintiff has been caused to suffer total disability and incapacity from the performance of labor and said conditions are permanent; that all of said injuries have been and will be attended with excruciating physical pain and discomfort, and mental anguish and distress in the past and into the future and permanently; that as a result of said injuries Plaintiff's ability to work and earn money has been seriously impaired if not completely destroyed and will continue so for the remainder of his life.

VII

That prior to said injuries Plaintiff was a strong, healthy and robust workman forty-nine (49) years of age with a reasonable life expectancy of approximately 23 years; that upon the occasion of his injuries and for some time prior thereto Plaintiff had been earning and was capable of earning $360.00 per month or $4320.00 per year; [fol. 6] that as a result of said injuries and the pain and suffering incident thereto Plaintiff's ability to labor and

earn money since the infliction of said injuries has been seriously and substantially impaired and probably totally destroyed and said conditions are permanent; that by reason of Plaintiff's physical pain and mental anguish suffered in the past, present and the physical pain and mental anguish he will suffer in the future and the loss of earning capacity in the past and the loss he will suffer in the future Plaintiff has been damaged in the sum of $124,360.00.

Wherefore, Plaintiff, H. T. Arnold, prays that Defendant, Panhandle & Santa Fe Railway Company, be duly cited to appear and answer this Petition and that upon final hearing he recover judgment against Defendant for his damages in the sum of $124,360.00 for costs of Court and for such other and further relief both general and special in law and in equity to which he may show himself justly entitled.

Gallagher, Francis, Bean, Wilson & Berry, 811 Gulf States Building, Dallas 1, Texas, By: Jack Berry, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 7] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

MOTION OF DEFENDANT TO BRING IN THIRD PARTY DEFENDANT—Filed May 28, 1954

To the Honorable Judge of said Court:

Now comes Panhandle and Santa Fe Railway Company, defendant in the above entitled and numbered cause and after giving property notice of this motion to Plaintiff, H. T. Arnold, by serving a copy hereof upon his attorneys of record, Gallagher, Frances, Bean, Wilson & Berry, 811 Gulf State Building, Dallas 1, Texas, asks leave of the Court to file a cross-action against R. A. Billings d/b/a

Billings Freight and Baggage Transfer, who is not a party to this action, but who is or may be liable to defendant or to the plaintiff, for all or part of plaintiff's claim against Panhandle and Santa Fe Railway Company.

Wherefore, premises considered, Defendant prays that the Court grant this motion to bring in and made R. E. Billings d/b/a Billings Freight and Baggage Transfer, a third party defendant in this cause.

McWhorter, Howard, Cobb & Johnson, 607 Lubbock National Bank Building, Lubbock, Texas, Attorneys for Defendant, Panhandle and Sante Fe Railway Company, By Charles L. Cobb, of Counsel.

A true copy of the foregoing motion was, on this 28th day of May, 1954, placed in the United States mail in an envelope addressed to Gallagher, Francis, Bean, Wilson & Berry, 811 Gulf State Building, Dallas 1, Texas, attorneys for plaintiff, with proper postage affixed, and notice is hereby given that action by the Court will be requested on [fol. 8] such motion on the 2nd day of June, 1954.

Charles L. Cobb, of Counsel.

[File endorsement omitted.]

[fol. 9] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

ORDER GRANTING LEAVE TO MAKE THIRD PARTY DEFENDANT—June 2, 1954

On this 2nd day of June, 1954, came on to be heard the motion of defendant, Panhandle and Santa Fe Railway Company, to make R. A. Billings d/b/a Billings Freight and Baggage Transfer, a third party defendant herein and the Court having considered said motion and having determined that the same should be granted;

It is Therefore Ordered, Adjudged and Decreed that the motion of Defendant, Panhandle and Santa Fe Railway

Company, as cross-plaintiff, to make R. A. Billings d/b/a Billings Freight and Baggage Transfer, a third party defendant be and the same is hereby granted.

James G. Denton, Judge, 99*nd* District Court, Lubbock County, Texas.

[File endorsement omitted.]

[fol. 10] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

CROSS ACTION—Filed June 2, 1954

To the Honorable Judge of said Court:

Now comes, Panhandle & Santa Fe Railway Company, a Corporation, herein called Third Party Plaintiff, complaining of R. A. Billings, d/b/a Billings Freight and Baggage Transfer, herein styled Third Party Defendant, and with leave of the court first had and obtained, files this its third party complaint, and would respectfully show the court, as follows:

I

Third Party Plaintiff is a Texas Corporation, operating a railway in Lubbock County, Texas, and Third Party Defendant is a resident of Lubbock County, Texas where service of process may be had and obtained upon him.

II

Third Party Plaintiff would show the Court that the said R. A. Billings, d/b/a Billings Freight and Baggage Transfer, is liable to the plaintiff, H. T. Arnold, for all of said plaintiff's claim against Third Party Plaintiff, and that said Third Party Defendant should be cited to appear herein pursuant to Rule 38, Texas Rules of Civil Procedure.

III

Third Party Plaintiff alleges that H. T. Arnold was, on or about January 16, 1952, one of its employees; that at about 9:15 a. m. on or about said 16th day of January, 1952, the said H. T. Arnold was engaged in his normal duties as a car inspector, and was walking along a graveled area in its yards adjacent to and southeast of the depot in [fol. 11] Lubbock, Texas. That, as the said H. T. Arnold walked along said graveled area, a truck owned and operated by R. A. Billings, his agent and employee, backed into and over H. T. Arnold and caused the injuries allegedly sustained by the said H. T. Arnold, and asserted by him as against Third Party Plaintiff. That defendant's agent and employee Joe Stone had driven the truck of Third Party Defendant in and upon said graveled area for the purpose of unloading mail from a baggage car spotted on one of Third Party Plaintiff's tracks; that such was a usual practice of the defendant, its agents and employees. After loading mail on said truck, the said Joe Stone, in the course and scope of his employment, negligently backed said truck into H. T. Arnold, knocking him to the ground and running over portions of his body.

IV

That on the occasion in question, defendant R. A. Billings, d/b/a Billings Freight and Baggage Transfer, his agents and employees were guilty of negligence in the following respects:

(A) In failing to keep a proper lookout.

(B) In operating said truck without having clear vision in the direction the truck was traveling.

(C) In operating said truck without the same being equipped with sufficient rear view mirrors.

(D) In failing to give a warning that the truck was being driven along said graveled area.

(E) In failing to sound an audible signal to warn that said truck was being backed along such graveled area.

Third Party Plaintiff alleges that each of said acts of negligence was a proximate cause of the injuries sustained

by H. T. Arnold, and furthermore, that said acts of negligence were each the sole proximate cause of the injuries and damages sustained by the said H. T. Arnold, and that this Third Party Plaintiff is not liable herein.

[fol. 12]

V

Third Party Plaintiff would further show that said accident was not caused or contributed to by any act of negligence upon the part of Third Party Plaintiff, and that as to Third Party Plaintiff, Panhandle & Santa Fe Railway Company, said accident was wholly unavoidable and, therefore, it is not liable to plaintiff H. T. Arnold.

VI

Wherefore, premises considered, Third Party Plaintiff prays that the said R. A. Billings, d/b/a Billings Freight & Baggage Transfer, Third Party Defendant herein, be cited to appear and answer this Cross Action as required by law, and that upon a hearing of this case, the said H. T. Arnold, plaintiff in this cause, recover nothing of Panhandle & Santa Fe Railway Company, and that Third Party Defendant be held liable for all claims asserted by said plaintiff, and that Panhandle & Santa Fe Railway Company do have and recover of and from Third Party Defendant such judgment as he is entitled to herein, the premises considered. Third Party Plaintiff further prays that it recover its costs in this behalf expended and that it go hence without day with all costs.

Lewis Jeffrey, Amarillo, Texas, McWhorter, Howard, Cobb & Johnson, 607 Lubbock National Bank Bldg., Lubbock, Texas, Attorneys for Third Party Plaintiff, Panhandle & Santa Fe Railway Company, By Charles L. Cobb.

Proof of service (omitted in printing).

[fol. 13] [File endorsement omitted.]

[fol. 14] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT, PANHANDLE & SANTA FE RAILWAY COMPANY'S FIRST AMENDED ANSWER—Filed June 2, 1954

To the Honorable James G. Denton, Judge of said Court:

Now comes, Panhandle & Santa Fe Railway Company, Defendant in the above cause, and files this, its First Amended Answer, and for such answer, alleges:

I

Defendant denies all of the allegations in plaintiff's petition except that defendant admits the allegations set forth in Paragraphs I and II of said petition, and except for the matters herein admitted, defendant denies each, all and every other allegation, and requires strict proof thereof, and of this denial, defendant places itself before the Court and Jury.

II

For further answer herein, if such be necessary, defendant says that it was not negligent in any of the respects alleged in plaintiff's petition, and that its negligence did not proximately cause such injuries, if any, as plaintiff may have sustained on or about the 16th day of January, 1952, while working for defendant.

III

Further specially answering herein, defendant says that if plaintiff sustained any injuries at the time and place in question, same were proximately caused by the negligence of the plaintiff in this: Plaintiff had been employed as a car inspector for several years, and was well acquainted with the location of this accident. That he knew [fol. 15] of the use of the graveled area described in plaintiff's petition, by R. A. Billings, his agents and employees, in loading and unloading mail. That on the date of his alleged injuries, and a short time prior thereto, he

saw said mail truck, and saw its driver in the act of loading and unloading mail. That he knew of its presence and knew that the driver of said truck would use such area in leaving the place where work was being performed. Disregarding such known facts plaintiff released steam from a baggage car, causing the same to emit a loud whistle, and while the same was whistling, he proceeded to walk along said graveled area with his back to the truck, and he knew or should have known that he could not hear the approach of said truck and did not take reasonable precaution for his own safety. The same was negligence. Defendant says that such negligence was the sole proximate cause of the injuries sustained, if any, and in the alternative, defendant says that such failure to use reasonable care for his own safety in walking with his back to said truck while under circumstances where he could not hear the approach thereof, was a proximate cause of such injuries as he may have sustained.

IV

Pleading in the alternative, defendant says that if plaintiff was not negligent in the premises, then, defendant says that it was in no way negligent, and that injuries, if any, sustained by plaintiff, were the result of an unavoidable accident.

V

Wherefore, premises considered, defendant prays that plaintiff take nothing by virtue of this suit, and that defendant go hence without day and recover its costs.

Lewis Jeffrey, Amarillo, Texas. McWhorter, Howard, Cobb & Johnson, 607 Lubbock National Bank Bldg. Lubbock, Texas, Attorneys for defendant, [fol. 16] Panhandle & Santa Fe Railway Company, By Charles L. Cobb.

Proof of service (omitted in printing).

[File endorsement omitted.]

[fol. 17] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

FIRST AMENDED ORIGINAL ANSWER OF DEFENDANT, R. A. BILLINGS—Filed November 16, 1954

To the said Honorable Court:

Now comes, R. A. Billings, d/b/a Billings Freight & Baggage Transfer, one of the defendants in the above entitled and numbered cause, and files this, his first amended original answer herein, thereby making answer to plaintiff's amended petition on file herein, and for such answer would show the Court the following:

I

This defendant denies the allegations of said plaintiff's petition and demands strict proof thereof.

II

Answering further herein, if required, this defendant would show the Court that if in fact plaintiff suffered the injuries described in his petition, as a result of the accident described in his petition, that said accident and said injuries and all damages resulting therefrom to plaintiff were caused by his own negligence and lack of care for his own safety in that plaintiff had been employed by the Panhandle & Santa Fe Railway Company on the premises where he was working on said occasion, for many years, and was well acquainted therewith; that he well knew that the said R. A. Billings used the graveled area described in plaintiff's petition in loading and unloading mail, and used said graveled area leading up to said cars as a driveway approaching said cars for access thereto and egress therefrom; on said occasion, and prior to said alleged accident, said plaintiff saw said truck in said area, and knew of its location therein; that with said knowledge he suddenly emerged from under a baggage car at a time when he had [fol. 18] released an air valve, or a steam valve, which was blowing with great force against the ground and rais-

ing a great cloud of dust, and causing a loud noise, so that plaintiff well knew that he could not hear the approach of the vehicle which he knew to be in the area, and which he knew would have to pass by the place where he was working in said area, and when he knew that by reason of the dust which he had raised by blowing the air or steam into the ground, that the driver of said approaching truck would not be able to see him moving from beneath said baggage car; that in spite of such knowledge and appreciation of the danger, the said plaintiff stepped from beneath said baggage car with his back turned to said truck and started along said gravel passage way used by said truck, taking no precaution for his own safety, making no attempt to keep a proper lookout for said truck, and making no investigation to determine whether he could move into said area and walk along said roadway with safety.

Defendant's truck backed along said area, in a cautious and prudent manner, at a slow rate of speed, making lawful and proper use of said premises, with consent of said Railway Company, and with full knowledge of said plaintiff, but the driver was prevented from seeing said plaintiff emerging from under said baggage car and stepping into the path of said truck, because of said cloud of dust raised by plaintiff, suddenly and unexpectedly; said plaintiff stepped into the immediate path of said vehicle, under circumstances making it impossible for the driver of the said vehicle to avoid striking him, if said truck did in fact strike said plaintiff. Defendant would show the court that the plaintiff was negligent in the following particulars:

1. In failing to keep a proper lookout, for his own safety.

2. In moving from under the baggage car and into the path of the defendant's vehicle when such movement could not be made with safety.

[fol. 19] 3. In moving into the graveled area with his back to the truck, under the existing circumstances of reduced visibility which he had created.

4. In voluntarily subjecting himself to a known danger, or to a danger which he should have known in the exercise of ordinary care, as above alleged.

Each said act of negligence on the part of the plaintiff was the sole proximate cause of the accident alleged and any damages suffered by the plaintiff; in the alternative each said act of negligence on the part of the said plaintiff was a proximate cause of said accident and any damages suffered by the plaintiff.

III

This defendant would show the Court that he was not negligent on the occasion in question, and if the plaintiff was not negligent, then this defendant would show the Court that said accident was an unavoidable accident, for which this Defendant is not liable.

IV

Defendant would show the Court that plaintiff in releasing said compressed air or steam, caused a cloud of dust and a sudden loud noise, obscuring the vision of the driver of the truck and plaintiff and causing plaintiff not to hear the sound of the approach of said truck, which said sudden noise and cloud of dust was a new and independent cause of said accident, and an intervening cause, so that this defendant is not liable therefor.

V

Answering further, if required, and in the alternative, this defendant would show the Court that the plaintiff's damages, if any, were proximately caused by the acts of negligence alleged in third party defendant's amended original answer in paragraph III, to which reference is here made, by the defendant Panhandle & Santa Fe Railway Company, its agents, servants and employees.

[fol. 20] Wherefore, premises considered, this defendant prays that plaintiff herein take nothing as to this defendant by his suit, and that this defendant recover all costs of suit.

Crenshaw, Dupree & Milam, P. O. Box 1499, Lubbock, Texas, By J. Orville Smith, Attorneys for Defendant, R. A. Billings.

Proof of service (omitted in printing).

[File endorsement omitted.]

[fol. 21] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

* * * * * * *

DEFENDANT, PANHANDLE & SANTA FE RAILWAY COMPANY'S FIRST SUPPLEMENTAL ANSWER—Filed November 22, 1954

To the Honorable James G. Denton, Judge of said Court:

Now comes, Panhandle & Santa Fe Railway Company, one of the defendants in the above cause as consolidated, and files this, its First Supplemental Answer, and for such answer says:

I

This defendant adopts the allegations of its original Cross Action and First Amended Answer herein.

II

Defendant specially denies the allegations of Paragraph III of the First Amended Original Answer of the Third Party Defendant, R. A. Billings.

III

This defendant specially denies the allegations of Paragraph IV of the First Amended Original Answer of the Third Party Defendant, and says that in truth and in fact, the actions and conduct of R. A. Billings, his agent, servant and employee, herein, was active and not passive, and that in truth and in fact, the negligence, if any, of the defendant Panhandle & Santa Fe Railway Company, which is not admitted, but denied, was passive and secondary, and that the injuries and damages, if any, caused H. T. Arnold, were caused by the active negligence of R. A. Billings, his agent, servant and employee, as alleged in this defendant's Cross Action herein.

IV

And, without waiving the above and foregoing, comes now defendant Panhandle & Santa Fe Railway Company, and denies generally and specially the purported acts of [fol. 22] negligence alleged as against it by both plaintiff, H. T. Arnold and defendant, R. A. Billings, d/b/a Billings Freight & Baggage Transfer.

V

For further answer herein, this defendant adopts that portion of Paragraph II of the First Amended Answer of R. A. Billings, reading as follows:

> "Defendant would show the court that the plaintiff was negligent in the following particulars:
>
> 1. In failing to keep a proper lookout, for his own safety.
>
> 2. In moving from under the baggage car and into the path of the defendant's vehicle when such movement could not be made with safety.
>
> 3. In moving into the graveled area with his back to the truck, under the existing circumstances of reduced visibility which he had created.
>
> Pl's exception sustained to this allegation
>
> 4. In voluntarily subjecting himself to a known danger, or to a danger which he should have known in the exercise of ordinary care, as above alleged.
>
> Each said act of negligence on the part of the plaintiff was the sole proximate cause of the accident alleged and any damages suffered by the plaintiff; in the alternative each said act of negligence on the part of the said plaintiff was a proximate cause of said accident and any damages suffered by the plaintiff."

VI

This defendant furthermore adopts the allegations of Paragraph IV of the First Amended Original Answer of the defendant, R. A. Billings.

Wherefore, defendant Panhandle & Santa Fe Railway Company prays judgment of the court as in its First Amended Original Answer and its cross action heretofore [fol. 23] filed in this cause.

Lewis Jeffrey, Amarillo, Texas; McWhorter, Howard, Cobb & Johnson, 607 Lubbock National Building, Lubbock, Texas, Attorneys for Defendant, Panhandle & Santa Fe Railway Co., By Charles L. Cobb, Of Counsel.

[File endorsement omitted.]

[fol. 24] In the District Court of Lubbock County, Texas, 99th Judicial District

[Title omitted]

Plaintiff's First Amended Original Petition—Filed November 22, 1954

To said Honorable Court:

Now comes H. T. Arnold, hereinafter called Plaintiff, complaining of Panhandle & Santa Fe Railway Company and R. A. Billings, d/b/a R. A. Billings Freight & Baggage Transfer, called Defendants, and for cause of action respectfully shows unto the Court the following:

I

That Defendant, Panhandle & Santa Fe Railway Company, is a railroad corporation duly incorporated and operating a railway system extending into and through Lubbock County, Texas, and beyond and into and through other states; that said Defendant has an agent located in Lubbock, Lubbock County, Texas; that process has been served.

That at all times mentioned herein, Defendant, Panhandle & Santa Fe Railway Company, owned, maintained, operated and controlled a railway system including trains, cars, tracks, road bed, right-of-way, stations, land, appli-

ances and other rolling stock and equipment in Lubbock County, and elsewhere in Texas, and into and through other states, and was so engaged in operating said railway system, trains and equipment and appurtenances thereto as a common carrier engaged in both intra-state and inter-state and foreign commerce hauling both freight and passengers for hire in furtherance of and substantially affected intrastate, inter-state and foreign commerce.

II

That Defendant, R. A. Billings, d/b/a Billings Freight & Baggage Transfer, is a freight, baggage and transfer organization operating in Lubbock, Lubbock County, [fol. 25] Texas, and R. A. Billings resides in Lubbock, Lubbock County, Texas, where he was serviced with process herein.

That at all times mentioned herein, Defendant, R. A. Billings, d/b/a R. A. Billings Freight & Baggage Transfer, owned, maintained, operated and controlled a transfer business, in Lubbock, Lubbock County, Texas; that in the operation of said business, Defendant owned, controlled and operated trucks, a warehouse and other units for the operation of said business and in the operation of said business had in its employ agents, servants and employees who worked under the direction, supervision and orders of Defendant; that among these employees were truck drivers.

That the Plaintiff, H. T. Arnold, is a resident citizen of Lubbock, Lubbock County, Texas.

III

That Plaintiff, H. T. Arnold, entered the employ of Panhandle & Santa Fe Railway Company approximately twenty-nine years prior to his accident, as hereinafter alleged, and remained steadily employed by said Defendant until his said accident and was, at all times mentioned herein, engaged in the due course and scope of his employment for said Defendant and under its direction, supervision and control until he suffered injuries, as hereinafter alleged; that at all times mentioned herein he was en-

gaged in work in connection with and furtherance of intra and interstate commerce.

IV

That heretofore, to-wit, at or about 9:15 o'clock in the morning of on or about January 16, 1952, the Plaintiff, H. T. Arnold, was engaged in the normal course and within the scope of his employment for said Defendant, working in the yards at the depot of Defendant in Lubbock, Lubbock County, Texas; that as Plaintiff was inspecting cars and while walking from one car to the next for inspection purposes and walking near the track on the [fol. 26] Defendant's right-of-way, he was struck and run over by a large motor truck, which backed into and over portions of his body; that said truck was used for hauling mail and other freight to and from the Defendant's trains and was on Defendant's property with full authority from Defendant Railway; that as said truck struck Plaintiff in the back, he was knocked to the ground with a great deal of force, and the truck wheels ran over various portions of his body, causing him to suffer serious and painful injuries, as hereinafter alleged; that the train cars that Plaintiff was in the process of inspecting at the time of his injuries were engaged, had been and would be in interstate commerce; that the work Plaintiff was doing at the time of his injuries was on and in connection with interstate passenger, freight and mail service, and said cars and train were owned, operated and maintained by Defendant in the furtherance of intrastate and interstate commerce.

V

That said large motor truck was owned, operated and maintained by Defendant, R. A. Billings, d/b/a R. A. Billings Freight & Baggage Transfer, and driven by its agent, servant and employee; that said truck backed into and over Plaintiff, causing him to suffer and sustain serious, permanent and painful bodily injuries, as hereinafter alleged; that Defendant's agent, servant and employee operating said truck was in the course and scope of his employment at the time in question and under the direction and supervision of both Defendants and negligently backed said truck into, against and over the Plaintiff.

VI

That on the occasion in question, Defendant, Panhandle & Santa Fe Railway Company, its agents, servants, employees and vice principals, were guilty of negligence towards the Plaintiff in each of the following respects:

[fol. 27] A. In failing to furnish the Plaintiff a reasonably safe place to work.

B. It failed to warn Plaintiff of the truck in the immediate vicinity where he was working.

C. It maintained no flagman or person to protect Plaintiff while performing his duties for the railroad.

D. It failed to furnish and maintain a blue flag for Plaintiff.

E. It was negligent in that it permitted said truck to be operated in a careless and negligent manner in the vicinity of where Plaintiff was working.

F. It was negligent in allowing said truck to be driven on an area normally used as a walk way.

G. In failing to keep a proper lookout for Plaintiff.

That each and all of said acts of negligence, jointly and severally, was a direct and proximate cause of the injuries received by the Plaintiff, H. T. Arnold, on the occasion in question.

VII

That on the occasion in question, Defendant, R. A. Billings, d/b/a R. A. Billings Freight & Baggage Transfer, his agent, servant and employee, were guilty of negligence towards the Plaintiff in each of the following respects, to-wit:

A. In failing to keep a proper lookout for the Plaintiff.

B. In operating said truck without having clear vision in the direction the truck was traveling.

C. In operating said truck without sufficient rear view mirrors.

D. In operating said truck with old, faulty and worn brakes, which the Plaintiff cannot allege more fully, in that said vehicle has been in the possession and control of Defendant since the date of the accident.

E. In failing to honk the horn of said truck to warn Plaintiff that the truck was to be driven in the area which Plaintiff occupied.

[fol. 28] F. In failing to turn said truck around and drive in a proper forward motion.

G. In failing to pull forward instead of to the rear.

H. In backing the truck at a speed in excess of that which is ordinarily prudent under the same or similar circumstances.

I. In driving said truck on a walk way.

J. In failing to keep said truck under proper control.

K. In backing said truck along beside the cars on which Plaintiff was working.

VIII

That as a result of the violent impact of said truck against Plaintiff's body and the running over of Plaintiff by said truck, he was caused to suffer and sustain severe, painful and permanent bodily injuries as hereinafter alleged:

Severe bruises, abrasions, lacerations, tearing and stretching of muscles, ligaments, tendons, nerves and blood vessels, pinched and impinged nerves, damage and injury to other soft tissues, attachments and organs, as well as crushed, jammed, displaced and fractured bones and joints to his body generally; concussion and contusions of the brain, with increased pressure resulting in vertigo, dizziness, headaches, impaired hearing and vision; crushing injury to the spine, resulting in lipping and fractures of the 3rd, 4th, 5th and 6th cervical vertebrae; lipping and fractures of the 1st, 7th, 8th, 9th, 10th and 11th dorsal vertebrae, as well as the 4th and 5th lumbar vertebrae, with displacement of bones and joints and overriding articular facets with corresponding reduction of the intervertebral space between the 5th lumbar vertebra and the sacrum, with pressure, imping-ment, herniation and rupture of the intervertebral discs; crushing injuries with fractures in the hands, arms and shoulders, with fragments of the fractured bones in the right hand; that as a result of said injuries and the extensive pain and suffer-

ing incident thereto, Plaintiff has suffered partial paralysis [fol. 29] of the extremities, stiff and immobile back, any movement, bending or rotation causing severe pain and muscle spasm; as a result thereof he has continuously suffered from infection, inflammation and hypertrophic- and ostero-arthritis, progressive in nature, causing his condition to become progressively more severe and disabling with the passing of time; that he has suffered incapacity from the performance of labor, and said conditions are permanent; that all of said injuries have been and will be attended with excruciating physical pain and discomfort, and mental anguish and distress in the past and into the future and permanently; that as a result of said injuries, Plaintiff's ability to work and earn money has been seriously impaired, if not completely destroyed, and will continue so for the remainder of his life.

Plaintiff alleges in the alternative that if any of said conditions, as alleged hereinabove, existed prior to January 16, 1952, that said prior conditions existed without his knowledge, discomfort or incapacity, and that said injuries suffered on January 16, 1952, aggravated, excited and aroused said prior conditions; that said injuries, together with the aggravation of said prior conditions, have caused Plaintiff to suffer serious and permanent incapacity, as alleged hereinabove.

IX

That prior to said injuries, Plaintiff was a strong, healthy and robust workman, forty-nine (49) years of age with a reasonable life expectancy of approximately 23 years; that upon the occasion of his injuries, and for some time prior thereto, Plaintiff had been earning and was capable of earning $360.00 per month or $4320.00 per year; that as a result of said injuries and the pain and suffering incident thereto, Plaintiff's ability to labor and earn money since the infliction of said injuries has been seriously and substantially impaired and probably totally [fol. 30] destroyed, and said conditions are permanent; that by reason of Plaintiff's physical pain and mental anguish suffered in the past, present and the physical pain and mental anguish he will suffer in the future, and the

loss of earning capacity in the past and the loss he will suffer in the future, Plaintiff has been damaged in the sum of $124,360.00.

Wherefore, Plaintiff, H. T. Arnold, says that Defendant, Panhandle & Santa Fe Railway Company, and Defendant R. A. Billings, d/b/a R. A. Billings Freight & Baggage Transfer, have been cited to appear and have answered this Petition; Plaintiff prays that upon final hearing he recover judgment, jointly and severally, against Defendants for his damages in the sum of One Hundred Twenty-four Thousand, Three Hundred Sixty and no/100 Dollars ($124,360.00), for costs of Court, and for such other and further relief, both general and special, in law and in equity, to which he may show himself justly entitled.

Gallagher, Francis, Bean, Wilson & Berry, 1010 Gulf States Building, Dallas 1, Texas, By: J. O. Bean, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 31] [File endorsement omitted]

IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

PLAINTIFF'S ORIGINAL SUPPLEMENTAL PETITION—Filed November 22, 1954

To the Honorable Judge of said Court:

Now comes H. T. Arnold, plaintiff in the above styled and numbered cause, and with leave of the Court first had and obtained, files this his Original Supplemental Petition, in reply to Defendant's First Supplemental Answer, and says:

I

Plaintiff objects and excepts to Paragraph 5, subsection 4, of Defendant's, Panhandle & Santa Fe Railway Company

First Supplemental Answer: "Involuntarily subjecting himself to a known danger, or to a danger which he should have known in the exercise or ordinary care, as above alleged."

Plaintiff excepts to said quoted portion of the defendant Railroad's Answer, for the following reason:

1. That it does not set forth any set of facts or fact showing any act or failure to act on the part of the plaintiff Arnold upon which contributory negligence might be predicated.

2. That same constitutes an effort on the part of the pleader to set forth the defense of "assumed risk" on the part of the plaintiff, which common law defense has been abrogated by the Title 45 USCA, known as the Federal Employees Liability Act, and decisions thereunder.

3. That said quoted portion of Defendant Railroad's answer is immaterial, incompetent, prejudicial, and does not set forth any defense or any act, or failure on the part of the plaintiff.

Wherefore, premises considered, plaintiff moves that [fol. 32] such portion of Defendant's Answer be stricken.

Gallagher, Francis, Bean & Wilson & Berry, J. O. Bean, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 1] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

No. 23280

H. T. ARNOLD,

vs.

PANHANDLE & SANTA FE RAILWAY COMPANY, *et al.*

July Term, 1954

Q. and A. Statement of Facts—Filed April 19, 1955

APPEARANCES:

Judge Presiding: Honorable James G. Denton.

For the Plaintiff: Gallagher, Francis, Bean, Wilson and Berry, Dallas, Texas. By: Mr. Ben H. Gallagher and Mr. J. O. Bean.

For the Defendant and Cross Plaintiff, Santa Fe Railway Company: McWhorter, Howard, Cobb & Johnson, Lubbock, Texas. By: Mr. Charles L. Cobb.

For Third Party Defendant, R. A. Billings: Crenshaw, Dupree & Milam, Lubbock, Texas. By: Mr. J. Orville Smith.

Be it remembered that on this the 22nd day of November, 1954, the same being one of the regular days of the July 1954 Term of the 99th District Court of Lubbock County, Texas, there came on for trial before the Honorable James G. Denton, Judge of said Court with a Jury the above styled and numbered Cause, whereupon the following evidence was adduced:

[fol. 2] (Jury selected and sworn.)

JURY IN

(Pleadings read, witnesses sworn, rule invoked.)

H. T. ARNOLD having been first duly sworn, testified on direct examination by Mr. Gallagher as follows:

Q. Your name is what?
A. Harry Theodore Arnold.

Q. Harry what?
A. Theodore.
Q. Harry T. Arnold?
A. That's right.
Q. Your full name is Harry Theodore Arnold?
A. Yes, sir.
Q. How old a man are you, please sir?
A. Fifty-two.
Q. Are you a married man?
A. Yes, sir.
Q. And where do you live?
A. 2804 1st Street, Lubbock, Texas.
Q. How long have you lived in this city?
A. 12 years past.
Q. Are you in the employ of any railroad company?
A. P&SF Ry.
Q. No abbreviations please. What is it?
[fol. 3] A. Panhandle & Santa Fe Railway Company.
Q. That is one of the defendants in this case?
A. Yes, sir.
Q. How long have you been in their employ?
A. Thirty-two years, three months and six days.
Q. Mr. Arnold, in what capacity have you been working for them?
A. I worked as a car inspector and as fireman.
Q. The duties of your employment, does it require you to go in, on, and about cars in the yard?
A. It requires me to make full inspection, inside, outside, top and bottom of the cars.
Q. On January 16, 1952, were you on that date in the employ of the Panhandle & Santa Fe Railroad?
A. Yes, sir.
Q. Before that time, Mr. Arnold, before that time I will ask you whether or not you were enjoying good health?
A. I was in perfect health.
Q. Were you able to, and did you perform physical labor for the Company before that time?
A. I could perform all duties in my department.
Q. Mr. Arnold, I will ask you whether or not on January 16, 1952, you sustained personal injuries down on the job?
A. Yes, sir.

Q. Now, was that here at the old railroad station before the new one went up?

[fol. 4] A. It was right South of the old railroad station.

Q. Are there a number of tracks leading into and in front of the railroad station?

A. The train yard passes by the station, in front of it.

Q. Now I will place at the top of the board—the blackboard, the letter "N" and I will ask you to regard that as the Northerly direction, will you do so?

A. Yes, sir.

Q. (Counsel writing on blackboard.) At the bottom of the board, blackboard, I have placed the letter "S" and I will ask you to regard that as the Southerly direction, will you do so?

A. Yes, sir.

Q. On the left-hand side of the blackboard, before the Court and Jury, is the letter "W", I will ask you—I will call that direction West, will you regard it as such?

A. Yes, sir.

Q. And on the right-hand side of the blackboard, the letter "E", I will call that the East, and will you so regard it in answering your questions?

A. Yes, sir.

Q. Did the tracks out there, please sir, run past the station in a true North South direction, or would it be more—what would it be?

A. The tracks in front of the station out here run practically Northwest and Southeast direction.

[fol. 5] Q. Could it be less difficult if we mark it due North and due South?

Mr. Cobb: I think that is the term the railroad men use.

Q. I will ask you to step down in front of the blackboard. Place a line for the main track, marking it about an inch wide—the main line, call it line number one, down the middle.

(Witness drawing on blackboard.)

Q. Put some railroad ties in there—not so many, but a few of them.

(Witness drawing on blackboard.)

I will ask you now, please sir, to mark the figure 1 beside the main line tracks..

(Witness writing on blackboard.)

Q. Locate the old station on that blackboard.

(Witness drawing on blackboard.)

I will ask you to put it closer to the "W", we are going to have other things to draw in between. Put the letter "S" on that, or station. (Witness writing on blackboard.) I will ask you whether or not there is a spur track leading up to, but not passing the station itself?

A. Yes, sir.

Q. Will you draw that on there?

A. That is a lot out of proportion.

Q. It is out of proportion then?

[fol. 6] (Witness drawing on blackboard.)

Q. It is out of proportion I grant you. I will ask you to erase it and place it the way you—more in proportion to the distances, first draw your station there about three or four inches long. (Witness drawing on blackboard.) Now, draw—mark that square there on the board "S" for station. And draw your spur line. (Witness drawing on blackboard.) Now, on the—what is the distance, if you know, between the East side of the spur tracks and the number one or the main line?

A. Seventeen feet four inches.

Q. What is the area like from the top of the spur line all through here, down to where it connects with the line marked, with line number one, what is the surface?

A. I suppose you would call it hard-topped surface, pressed caliche, hard-top.

Q. Is it level?

A. Yes, sir.

Q. Is it smooth?

A. Yes, sir.

Q. Is it hard?

A. Yes, sir.

Q. May it be compared to pavement?

A. Yes, sir.

Q. On the left-hand side, or West side of the spur track, is there a hard gravelled surface?

[fol. 7] A. Yes, sir.

Q. Draw that in there, please. What is that surface?

A. That is gravel walk-way, pressed gravel walk-way.

Q. Is it hard?

A. Yes, sir.

Q. Is it smooth?

A. Yes, sir.

Q. Is it level?

A. Yes, sir.

Q. Now, what is the width of that surface or walk-way from the West side of the—or the spur rail to the grass over here? In other words, how wide is it?

A. Ten feet and eight inches.

Q. Write it on there, please sir. (Witness writing on blackboard.) Now, on the day in question I will ask you how many cars were on the spur tracks which you were engaged in inspecting and working on?

A. Three baggage cars.

Q. How long was each car?

A. Seventy-two feet, average.

Q. Will you place car number 1 up here some length, just draw it there where it occupied. (Witness drawing on blackboard.) Now, car number 2—first, mark that car number 1. (Witness writing on blackboard.) Place car number 2. Mark car number 2. (Witness writing on blackboard.) Will you — were they connected to-

[fol. 8] gether?

A. Yes, sir.

Q. Wet your finger and make a separation between the two so you don't have them run together. Car number 3, was it on the same track?

A. Yes, sir.

Q. Will you draw it on there. (Witness drawing on blackboard.) Was it connected with car number 2?

A. No, sir.

Q. Were there any doors in those cars?

A. Yes, sir.

Q. Will you wet your finger and make the door on the West side there?

A. All the cars?

Q. All three cars, yes, sir, both sides. (Witness marking

on blackboard.) I will ask you whether or not—first of all—where did you begin your work?

A. I came across over in the yards here (indicating), and entered the car here.

Q. Car number 1?

A. The East door, North end, came through that car, these cars have end doors where you can go from one car to another.

Q. Stop there a minute, please sir, and let me ask you, who was in the car when you went through it, anybody?

A. When I entered this car there was four or five men, Santa Fe men, railroad men, throwing mail out on a [fol. 9] truck, R. A. Billings' truck, parked on the West side.

Q. Go ahead and say what you did.

A. I entered this car and come on down to this door——

Q. What door?

A. The West door of the South end of the second car. I came out of that door and walked down the walk, into this walk.

Q. Just a second, please. How did you come out of that door?

A. I came out with my face to the car door, backed out.

Q. Is that the usual way to come out of the door?

A. That is railroad standard, yes, sir.

Q. You came out of car number 2?

A. Yes, sir, the West door, South end.

Q. To be clear, was it the front door of car number 2 that you came out of, or the back door?

A. The back door.

Q. The back door?

A. Yes, sir.

Q. And, that would be the South door on the West side of car number 2?

A. That's right.

Q. And when you came out there you landed on your feet, is that right?

A. I got out on my feet, yes, sir, as I came out the side of the car.

[fol. 10] Q. Did you look either way?

A. Yes, sir.

Q. Which way did you look and what did you see?

A. I looked up the track North and seen the truck setting there, back end angling to the car.

Q. And that was a Billings truck?

A. Yes, sir.

Q. Now please, sir, draw that truck the way it faced, and the angle it was placed with respect to the North door of car number 1. (Witness drawing on blackboard.) When you came out of the South door of car number 2 you say you saw that truck there?

A. I did, yes, sir.

Q. Was there anybody on it?

A. There was a man in the back end of the body of the truck handling the mail.

Q. Who was it?

A. R. A. Billings' driver, Joe Stone.

Q. Will you please mark an arrow along the line of that ruler, such as, pointing toward the place you got out of that car? Make a little arrow there. (Witness drawing on blackboard.) How high up was the back of the truck—was the back of the truck to the coach.

A. Yes, sir, it was angled.

Q. And conversely it was headed away from you?

[fol. 11] A. Yes, sir, that's right.

Q. What kind of a truck was that?

A. It was—the make of the truck?

Q. Yes, sir.

A. Chevrolet.

Q. Was it a single tread or a dual tread rear?

A. Dual wheels.

Q. What weight truck was it, capacity truck rather?

A. I would say approximately two-ton.

Q. What did it have on the side, anything?

A. The side of the bed was metal up practically as high as your head and it was topped over with some kind of metal boards.

Q. Did it have siding on the truck, for the purpose of the record?

A. Yes, sir.

Q. Did it have bows over the top?

A. Yes, sir.

Q. Was it covered with anything?

A. Yes, sir.

Q. What?

A. The top was covered with canvas at that time.

Q. How high up in the truck did the mail come?

A. Approximately six feet.

Q. Sufficiently high, was it, to cover the window in the cab?

A. Yes, sir.

[fol. 12] Q. To the rear of the cab, the rear cab window?

A. Yes, sir.

Q. And then, was there any effort to move the truck as you came down on the ground and looked up that way?

A. No, sir.

Q. When you came down on the ground at that point, what was the next thing you did?

A. I walked South along this West side next to these doors on this car, the doors on this car, and I had to enter this car. These doors on this side, the West side was both closed, and while I was at the middle of the car, this car goes back to Dallas——

Q. Just tell me what you did.

A. I changed the brakes from passenger service to freight service on this third car.

Q. You walked down toward car number 3, did you?

A. Yes, sir.

Q. Then what did you do?

A. When I was about the center of the car, the brake valve, one brake valve, line valve, was just about a little North of center, I closed it and walked back facing the truck.

Q. Just a second. Did you turn around and walk back towards the truck?

A. Yes, sir.

Q. When you were walking back from the position of car number 3 back toward car number 2, were you observing [fol. 13] the truck, seeing it?

A. Yes, sir.

Q. Go ahead.

A. I walked back beside of this car number 3, right by

the door, there are steps by the door, and I reached over there and took my claw hammer and opened the valve on the reservoir tank, air drum, and turned and walked back.

Q. Just a second. Will you mark an "A" where it was that you loosened the air valve on the air drum? (Witness writing on blackboard.) Put an "A" out there so we can read it. And, before you opened that valve, did you take any look up the walk way?

A. When I turned and faced the North and walked toward the North, coming back to this valve, this truck was still setting back at the car at an angle.

Q. Headed toward or away from you?

A. Headed away from me.

Q. Did you open the air valve?

A. I did, yes, sir.

Q. And did air spew out of it?

A. Yes, sir.

Q. Upward or downward?

A. Downward.

Q. And was it loud at first or not, or just describe it.

[fol. 14] A. The first second it was a loud blast, and it faded away.

Q. After you—did some dust come up?

A. There was a small amount of dust came up, yes.

Q. Did you ever go under the car to open that valve?

A. I was not under the car whatever.

Q. Did you have to put any of your body under the car unless you reached under it with your hand to open it?

A. I reached under arm length, plus the length of my claw hammer handle to reach the valve. I did not have to get under the car.

Q. And how long did it take you to turn that valve?

A. Oh, approximately two seconds.

Q. Did you watch it or did you get up and go away?

A. I just raised right back up and walked on.

Q. Getting back to this dust that we have been hearing about, how high up did that dust come up, around your body?

A. Around waist high. It didn't ever cover me.

Q. How long did it last?

A. Just like that. (Witness snapping finger.)

Q. Did it ever envelop you?
A. No, sir.
Q. Did it ever hide you from view?
A. No, sir.
Q. Did it ever come higher than your waist?
A. I doubt it.
Q. How long did it last that way?
[fol. 15] A. A second, maybe.
Q. Did you stay in it or did you walk away?
A. I walked away.
Q. What direction did you walk?
A. South.
Q. From the time that you straightened up there from turning that air valve, you walked on down the walkway?
A. Yes, sir, walked South.
Q. About how many steps did you take before something happened to you?
A. Approximately ten steps.
Q. Taking about how many feet to a step?
A. Oh, about two and three-quarters to three foot to a step.
Q. We will call it twenty-seven feet you walked.
A. Yes, sir.
Q. Would that be about right?
A. That would be awful close to it.
Q. Just show this Jury how you walked that ten steps. Come right down here. (Witness walking in front of Jury.) And after a count of about nine or ten, what happened to you?
A. I got hit in the back.
Q. What hit you in the back?
A. R. A. Billings' truck.
Q. What part of the truck hit you?
A. The end gate was at an angle and it hit me across the [fol. 16] shoulder and the corner of the—the right-hand corner of the truck hit me in my lower back.
Q. That is the right-hand corner of the truck with respect to the truck driver sitting in it?
A. Yes.
Q. As you looked toward the front of the truck from the back it would be the right-hand side?

A. Yes, sir.

Q. That is the truck, the right-hand side hit you?

A. Yes, sir.

Q. The end gate hit you where?

A. Across my shoulders.

Q. And did any other part of the truck hit you?

A. Just the corner of the truck, and the end gate of the truck and the corner of the truck was all that hit me that I know of.

Q. What part of your body did the end of the truck hit you?

A. In the back.

Q. What part of your body?

A. Lower back.

Q. Lower back?

A. And shoulders.

Q. Did it knock you any distance?

A. It knocked me approximately ten or twelve feet.

Q. And when you landed, how did you land?

[fol. 17] A. I came down on my right elbow and shoulder and left hand and both knees.

Q. What did you see up over you coming at you after you landed on the ground there?

A. I seen the back end of that big truck coming.

Q. What did you do right then?

A. I done the best I could to get out of the way of it.

Q. What did you do?

A. Crawled.

Q. What direction?

A. To the Southwest according to the way we have got this map drew.

Q. Toward the left-hand wheel of the truck to get out of the way of it?

A. Yes, sir.

Q. Did you get your body away from it?

A. I got my body out of the way, yes, sir.

Q. Did any part of the truck run over you?

A. Yes, sir.

Q. What part?

A. The left inside dual wheel, and the left outside dual wheel, in other words both dual wheels, run over my right

hand and arm below my elbow, wrist in here, and the outside dual wheel rubbed the side of my head, while it went across, on account of being on my hand, I couldn't get away, it rubbed the side of my head, roughed up the skin [fol. 18] on the side of my face a little and rubbed my cap off.

Q. If the wheel had been two inches over it would have run over your head?

A. It wouldn't have had to have been that far.

Q. Did it break the skin on the side of your face?

A. It did, yes, sir.

Q. In other words, the wheel had your hand pinned down and the truck going by your cheek?

A. Yes, sir, I had my left hand, throwed it against the wheel as the wheel came by.

Q. Mr. Arnold, was that hard or soft stuff that you went down on?

A. It was hard.

Q. Hard as a rock?

A. About as hard as this floor here. A little rougher than that.

Q. If you had your work to do over again, now listen, if you had all of your work to do over again from the second you entered, on the second you entered car number 1 door up here where they were loading that mail, to the second you were hit, is there a thing now, two years and ten months later on that you can think of that you would do different?

A. No, sir.

Q. For your own sake?

A. No, sir. I was working in a safe way.

[fol. 19] Q. Mr. Arnold, how wide is that truck?

A. I never measured the truck, but I will say eight feet, maybe a few inches over.

Q. How wide, please sir, is that walk way that he tried to back that truck over?

A. Eight feet—ten feet eight inches.

Q. Is there——

A. I have got it there.

Q. Beside that edge of that gravel portion is there any kind of poles there?

A. There is two light posts, yes, sir.

Q. Put a circle there for them. About how far are they from the gravel?

A. The center of the post would be approximately eighteen inches from the gravel.

Q. Was there another one?

A. Yes, sir, there was two of them. It would be about that location right there. (Witness drawing on blackboard.)

Q. Speaking—you say that was ten feet eight inches?

A. Yes, sir.

Q. That walk way?

A. Yes, sir.

Q. And the truck was how wide?

A. Eight feet, or eight feet and a few inches.

Q. That would leave a clearance of a foot or so on each side?

[fol. 20] A. Yes, sir.

Q. Now judging from a man in that truck in the driver's seat, like the Billings' driver was, would he had to drive forward before he could back up?

A. He would absolutely have to go forward before he could come back on account of the back end against the car.

Q. When you saw him headed the other way and angled toward the car, what direction did you think the man would take going out?

A. Anybody would think he would go ahead, on account of his wheels being cut at an angle. This drawing of the depot is just a little out of proportion.

Q. Could he go in front of the station?

A. He could and has.

Q. Once or more than once?

A. Lots of times.

Q. Can he drive in front of the station and turn to the left and get out on the street there?

A. At that time the old depot down there—the depot should be like that—(Witness drawing on blackboard.) He could go around and come off the platform and head right off toward town.

Q. Now in speaking of the way—was there ever a time there where that hard surface road or walk way there,

and in front of the station, where you had to remove your baggage and remove the express by pull wagons or dolly wagons?

[fol. 21] A. They removed the mail and baggage from these cars, from what we call our baggage wagon, which is a four wheel wagon and pulled by hand at that time.

Q. That was sometime before you got hurt?

A. Yes, sir.

Q. Were there signs there indicating whether that property was private railroad or public?

A. Over here to the West of this spur, to the Southwest was a sign, in fact there was one over here. There used to be a welding shop there years ago. I don't remember what years it was. There was a sign back over by that building. I don't know whether I can quote the words exactly but "Private Property, P & SF Ry. No trespassing".

Q. When you got hit, how far were you from the edge of number 3 car?

A. I was approximately two feet clearance between my left side and the side of the car.

Q. And judging from the cover over that truck and the height to which the mail was stacked, and the driver would get in there and straighten it up, pull it forward and back up, I will ask you whether or not he was backing blind, with respect to seeing you?

A. I would say he was, yes, sir.

Q. Would there be any way that that driver, when he straightened up his truck, could see you or anybody else [fol. 22] going along that car?

A. No, sir.

Q. He could not?

A. No, sir.

(Court recessed until 9:00 A. M. November 23rd, 1954.)

JURY OUT

9:00 A. M. November 23, 1954

JURY IN

H. T. ARNOLD, (Continued) having been heretofore duly sworn testified on further direct examination by Mr. Gallagher as follows:

Q. Mr. Arnold, did you—the measurements you gave yesterday about the area surrounding the cars, the three cars in question, did you personally make those measurements?

A. I did, yes, sir.

Q. Did you make them at my request?

A. Yes, sir.

Q. Did you measure it with a steel tape?

A. I did, yes, sir.

Q. What is the distance from the mail truck, the Billings truck, down to the point where you were hit, down in here some place?

A. 185 feet.

[fol. 23] Q. What is the distance, I think you mentioned it yesterday, that you walked from the time you let the air drum valve loose until you were hit?

A. Approximately 27 to 30 feet.

Q. At about how many miles per hour, at the rate you walked away from that valve going South along the cars did you walk on that occasion?

A. About two and a half miles per hour.

Q. Which would make the speed of the backing truck about what?

A. About six times faster than I was going, it would be 15 miles an hour.

Q. Now, before you started to work on those cars, did you place any flag on the South end of the last coach or coach three.

A. I did, yes, sir.

Q. What size was that flag?

A. Approximately 18 inches square.

Q. What does that flag mean?

A. It means men at work, man or men.

Q. If the Billings truck entered this walk way or passage way as you may call it, going from a direction of South toward North would that or not be visible were he keeping a look out?

A. It would, yes, sir.

Q. You indicated yesterday as I recall that the truck was backed into, or next to the door through which mail was being loaded, am I correct?

[fol. 24] A. Yes, sir, that's right.

Q. The angle of that truck was about what, I think you said yesterday?

A. Somewhere around 30 degree angle.

Q. And did you say that his wheels were cut to the right?

A. Yes, sir.

Q. From backing in?

A. That's right.

Q. Was there or not sufficient room from where the front of that truck was and the South end of the station building where Mr. Stone, the truck driver, could have pulled up and turned around and driven out head first?

A. Yes, sir.

Q. Was there ample room?

A. Yes, sir.

Q. Was there any steam pipe or any other obstruction of any character from the position of the truck to go to the right of the station, or East of the station, and go North and go around to the left?

A. No, sir.

Q. And go out on the street?

A. No, sir.

Q. Are you sure about that?

A. I am positive unless he run over the end of the railroad tracks there.

[fol. 25] Q. Could that be done, is my question?

A. No, sir.

Q. I say, could he drive from there to there to there?

(Counsel indicating.)

Mr. Smith: We object to him repeating the question after the witness has answered.

A. Yes, sir.

Mr. Gallagher: Obviously the witness didn't understand.
The Court: I will overrule your objection. Go ahead.

Q. Before you were hit was there any horn warning given by the truck driver?
A. No, sir.
Q. To tell you of the approach of his truck?
A. No, sir.
Q. Was there any warning by anybody?
A. No, sir.
Q. Will a truck with rubber tires on that hard pavement or hard surface make any noise coming back, rolling or driving along, other than the motor?
A. I would say very light noise, if any.
Q. Mr. Arnold, was there ever a time during your employment out there where vehicular or motor traffic was prohibited from operating on the East area—the West area and the East area?
[fol. 26] A. Yes, sir.
Q. Can you name that time?
A. Back in the early forties there was no vehicles allowed around there.
Q. Who was the agent, not the ticket agent, but the agent in charge of the area or grounds?
A. Mr. Bayless, I believe his initials are R. F.
Q. Lives here in Lubbock?
A. Yes, sir.
Q. Was that policy later changed?
A. Yes, sir.
Q. And trucks came up for the mail, is that right?
A. Yes, sir, that's right.
Q. Now have you at any time before you got hurt called it to the attention of the agent in charge of the station area?
A. Yes, sir.
Q. About those trucks?
A. Yes, sir.
Q. What did you tell him?

A. I told him it was dangerous the way he backed up along there.

Q. Who was the agent?

A. Mr. H. C. Pumphrey.

Q. Is he still in charge here?

A. Yes, sir.

Q. Did he make any reply to that notice?

[fol. 27] A. He agreed with me that it was dangerous.

Q. But thereafter, and notwithstanding, was the practice continued of trucks coming up?

A. Yes, sir.

Q. To get the mail?

A. It is continued, yes, sir.

Q. Did Billings still continue it, Billings Trucking continue coming up there, having a contract for the mail?

A. Yes, sir.

Q. Now the manner in which, not having anything to do with the present collision and hurting, but before that time, I will ask you whether or not you observed the Billings truck driving to and fro along the walkway and over the area there?

A. Yes, I have seen it.

Q. I will ask you whether or not—just describe the manner in which he drove on some occasions.

A. I have seen him enter the platform of the depot at the North end and come along the front of it and head alongside the cars and load the mail and go out this way, to the South. I have seen him come in from the South and load and go out around the depot and jump off about a four inch curb we had there at that time at the old depot, it was a little different than the new one is now. I have seen him go both ways there.

Q. In the handling of that truck, in backing out, has he ever come in contact with the coaches standing there?

[fol. 28] A That truck has bent several handholds on the side of the cars, in fact he broke one one time while I was on duty and I had to send the car to Slaton for repairs.

Q. Also in occupying and using these cars in unloading, I will ask you whether or not the Railway Express Agency also used them?

A. Yes, sir, they used them.

Q. What means do they get the express from the cars to the express room up there?

A. These four wheel baggage, or express wagons as we call them.

Q. Could the mail have been unloaded that way by Billings instead of coming up to the car?

A. Yes, sir.

Q. Were there mail trucks, baggage trucks available for that purpose if they wanted to use them?

A. Yes, sir.

Q. What was the distance between the East side of the coach and the first rail of the main line?

A. Seventeen feet four inches.

Q. Could the truck have loaded from the East side, unloaded the mail, the Billings truck?

A. It has done it.

Q. What stopped that, or did it stop?

A. Yes, it stopped; however, there was two different freight trains had to stop for him to be out of the way, to keep from hitting him, I suppose that put a stop to that [fol. 29] side.

Q. Was the weather clear that day?

A. Yes, sir.

Q. Anything to impede visibility?

A. No, sir.

Q. When you were hit, I will ask you what clothing you were wearing, whether one pair of trousers or more?

A. I was wearing a pair of corduroy trousers under my overalls, which made corduroys and overalls on my legs. I had on a light blue shirt, I mean just light weight work shirt. I had on a jumper, jacket same weight as the overalls.

Q. I didn't want all of your clothing, my question was just the trousers. I will ask you—you say you had corduroy trousers on?

A. Yes, sir.

Q. With what force did that truck hit you in the back?

A. It knocked me approximately ten or twelve feet.

Q. How did you land?

A. I hit on my right elbow and shoulder and left hand and both knees.

Q. How much did you weigh on that occasion?

A. Approximately 185 pounds.

Q. What happened to the knees of your cordurory breeches?

A. I busted both the knees out of the cordurory breeches and also ruffled the overall leg bad on the right knee. It [fol. 30] was a brand new pair of overalls.

Q. And when you managed to clear the left rear wheel, all but your hand and wrist I will ask you if he kept on backing back, how far?

A. He backed back to where the front wheel was approximately two feet back over where he had actually run over my arm.

Q. Did you tell him anything?

A. I did.

Q. What did you say?

A. I asked him couldn't he see where he was going. I said "You run over me".

Q. What did he say?

A. He said "I didn't see you".

Q. Did you report that to the station agent, your injury and the collision?

A. Within a very few minutes, yes, sir.

Q. Did he send you to a doctor?

A. Yes, sir.

Q. By written order?

A. That's right. Yes, sir.

Q. What doctor did he send you to?

A. Dr. Batson.

Q. Here in Lubbock?

A. Yes, sir.

Q. And then what did you do?

[fol. 31] A. I went to Dr. Batson and he sent me over to the West Texas Hospital to get some X-rays made of my hand and arm and I carried the X-rays back to Dr. Batson.

Q. Now right when you got hurt I will ask you what your hand, your neck, your back felt like, whether any part was bothering you?

A. My hand and arm was numb, I had no feeling in it whatever. My back was hurting, my lower back and my

upper back through my shoulders and neck where I was hit was hurting. I was in pain.

Q. When you got through with the examination by the doctor where did you go?

A. Well I went back down to the shack here, as we call it, where I worked and my foreman was there and had another man to relieve me and I came back home, stayed at home.

Q. What did you feel like that night?

A. Well I hurt, had pains.

Q. Where?

A. In my back and my arm had kinda got over the deadness where I had more pain.

Q. Did you go back to the job the next day?

A. Yes, sir.

Q. Have you worked off and on since that time?

A. Yes, sir.

Q. Now, I will ask you, in the performance—or since you have been injured, whether or not Dr. Dunn has ever [fol. 32] examined you for the railroad company?

A. I took treatments from Dr. Dunn, yes, sir.

Q. Dr. Dunn here in this city?

A. Yes, sir.

Q. Did he prescribe anything for your back?

A. Yes, sir.

Q. What?

A. A support or brace, whichever you want to call it.

Q. Are you wearing it?

A. Yes, sir.

Q. Do you have it on now?

A. I have.

Q. Do you wear it everyday?

A. I do.

Q. The times you have worked, since you have been hurt, I will ask you whether or not if it be a part of your duties you are able to open car doors?

A. No, I can not open car doors.

Q. Why?

A. It is too hard for me to open them in the condition I am in.

Q. I will ask you whether or not you can go between cars and couple air hose?

A. I have, but it just tears me up to do it, through my shoulders.

[fol. 33] Q. What part?

A. My shoulders and my lower back, stooping, my shoulders from actually coupling the hose and my lower back from stooping.

Q. And normally, is it a part of your duties to open the journal boxes and inspect them?

A. That is part of the car man's job, yes, sir.

Q. A journal box has a bunch of waste in it, doesn't it?

A. That's right, yes, sir.

Q. And at the end of the axle?

A. That's right, over the end of the axle.

Q. And can you open the journal boxes with a hook?

A. No, sir.

Q. Who does that for you?

A. One of my fellow workmen.

Q. Can you climb straight up like the side of a car or ladder?

A. No, sir.

Q. Why?

A. It tears me up through my shoulders, reaching up getting hand holds.

Q. What kind of a sensation is it that you experience when you get your hands above your head to work?

A. It hurts between my shoulders and neck.

Q. What kind of hurting?

A. Painful hurting.

Q. Can you take a hammer and nail boards above your [fol. 34] head like that? (Counsel indicating.)

A. No, sir. I have nailed some approximately as high as my head.

Q. Sir?

A. I have nailed some about as high as my head, but not above my head.

Q. In making your inspection work, the draw bars, they are the couplings between the cars?

A. Yes, sir.

Q. How do you go over them now?

A. I just squat down and look under there. I can't bend over like I used to.

Q. Can you climb over the draw bars?

A. I can, but it puts me in an awful strain and pain.

Q. Since you have been hurt have you explained to the railroad your inability to do those things?

A. Yes, sir.

Q. And what have they done in response to your complaints, or explanation rather?

A. Well, I have been doing light duty on my work. If that is what you have reference to.

Q. Have they ever in the past provided a helper for you?

A. Yes, sir.

Q. Have you ever requested a helper?

A. I have, yes, sir.

[fol. 35] Q. And they have done it?

A. Yes, sir.

Q. And you have been kept on the job?

A. I have been kept on the job, yes, sir.

Q. At the same pay, for that matter?

A. That's right, yes, sir.

Q. Now Mr. Arnold, you tell me it was the 16th of January of '52 that you got hurt?

A. That's right.

Q. And then you were home a day or something like that for the rest of the day, whatever the truth is, and then you went back on the job?

A. I reported to the Doctor at 10:00 A. M. the 17th and he released me to go back to work and I went back to work, yes, sir.

Q. When you first went back did they give you a helper?

A. Yes, sir.

Q. To do the hard part of your work?

A. That's right, yes, sir.

Q. You worked along how long, without quitting, without stopping, I mean without being compelled to quit?

A. Well, I lost one day in February, and I lost the first of March through the ninth of March, and I went back to work the tenth of March.

Q. From the 1st to the 10th you were off?

[fol. 36] A. Yes, sir.

Q. Of March?

A. Yes, sir.

Q. 1952?

A. That's right.

Q. Where were you?

A. I was at home part of the time and I spent four days in the railroad hospital at Topeka, Kansas.

Q. Now some reference has been made to a railroad hospital or association hospital, between my friend and me, how do you get into one of those hospitals?

A. To enter the hospital I have got to have an order from my supervisor or whoever is instructed to put them out here at this place, and I report to the local doctor here, and he gives me an order to take to the hospital and I have got to have it to enter the hospital.

Q. Just to clarify matters, could you, the way things are done over there, get on the train on your own hook and go up to Topeka, and say "I am an employee in good standing and I want to be hospitalized," or "I want to be examined," could you do it that way?

A. No, sir. I could not.

Q. What was the reason you quit work March 1st, 1952?

A. I just couldn't stand the work.

Q. What was your capacity and capability to work from the time you got hurt then going on down to March the 1st, [fol. 37] roughly six weeks, did you get better along that time or gradually get weaker and worse?

A. I got worse, yes, sir.

Q. And then you came—and what did they do for you up in Topeka?

A. They taken some X-rays.

Q. What else? Go on.

A. That was all.

Q. Did they give you any treatment?

A. No, sir.

Q. X-rayed your back?

A. Yes, sir.

Q. And when you came back, when did you go back to work?

A. March 10th.

Q. And then you worked until what time in '52?

A. I was off March the—I worked through March 26th.

Q. To March 26th?

A. Through March 26th, including March 26th.

Q. And then what happened to you?

A. Well, I was off on Friday, and my off day is Saturday and Sunday, and I was—I had been trying to go back to the hospital again and I didn't make it and I laid around home for awhile and I re-entered the hospital at Topeka, Kansas.

Q. How long were you in the hospital up there?

[fol. 38] A. 82 days.

Q. During that time—what happened between March 10th and the 26th, sixteen days that made it necessary that you go back to the hospital?

A. I just kept going down and I couldn't stand it.

Q. What did they do for you up there in the hospital at Topeka?

A. Well, he give me physical treatments, and shots, and I took 1184 pills.

Q. What date did you return to Lubbock and go back to work?

A. I returned to Lubbock in July, and went back to work August 4th in '52.

Q. August the 4th, 1952?

A. Yes, sir.

Q. At your same work out there as an inspector?

A. Yes, sir.

Q. Did you feel much better after that treatment?

A. Well right at first I felt a little better, on account of no exercise and laying around, but after I entered the job I began to go down again.

Q. How long did you work on that trip, please, sir?

A. I worked from August the 4th to December 31st, 1952.

Q. August 4th to December 31st, we will call that January the 1st, 1953. What occurred then to cause any change in your status?

[fol. 39] A. My shoulders and back was just paining so I couldn't stand it.

Q. Was it the same this time as before or different, where you felt pretty good when you went back to work in August and then gradually started going down hill?

A. That's right, I'd go down every time I'd go to work.

Q. Your work made you go down hill?

A. Yes, sir.

Q. Was there any other cause? Was it your work that did it?

A. Yes, sir.

Q. On January 1st 1953, how long were you off then?

A. I was off from January 1st 1953 through October the 18th 1953.

Q. Where were you during that period of time and what did you do?

A. I was at home part of the time and I spent 47 days in the hospital at Topeka again.

Q. The same doctors?

A. Different doctors, same hospital.

Q. Did you receive treatment up there?

A. Yes, sir. I got more physical therapy treatments and some more pills.

Q. What part of your body did they treat?

A. I took the physical therapy treatment on my back.

Q. Did you improve?

[fol. 40] A. The last time it like to have got me down up there, I mean that time on that 47 days that I was there it like to have got me down.

Q. What do you mean by like to have got you down?

A. I just couldn't stand it, and I complained about it and they finally sent me home.

Q. Did they send you back to Dr. Dunn?

A. Yes, sir.

Q. What did Dr. Dunn do?

A. He gave me a few heat treatments over here on my back.

Q. And did he let you go back to work?

A. Yes, sir.

Q. Do you know whether he ordered limited service or full service?

A. He gave me a release to go to work on light duty only.

Q. Now, when you went back to work on October the 18th, 1953, how long did you work this time?

A. I worked through February 19th of this year.

Q. What happened then?

A. I just got run down and weak and I had to take off.

Q. Did you go back to Topeka this time?

A. I did, yes, sir.

Q. What did they do for you up there?

A. Oh, they X-rayed me and gave me some more pills.

Q. Did you have any disease complication this time?

[fol. 41] A. Yes, I had some disease. The doctor called it hepatitis.

Q. What does that mean?

A. I don't know. Im not no doctor. I don't know what that means.

Q. It has to do with the liver, just so we will understand?

A. Yes, sir, that's right.

Q. And then you came back to work when?

A. I came back and went to work May the 10th of this year.

Q. Have you been on the job since that time?

A. Yes, I have been on the job since that time.

Q. And do you know, let me ask you this question, please sir, do you have any—anybody at the railroad ever tell you that you are going to have any employment after today?

A. No, I have never been told whether I would or wouldn't.

Q. Is there anyway—do you have any way of forcing employment on them if they don't want you?

A. Not that I know of.

Q. In other words, if they want to keep you on they will and if they don't they won't, is that it?

A. That's right.

Q. There is no obligation to do so, that is what I am getting at?

A. No, sir.

Q. Now the various things you do at work, I will ask you whether or not at work, or any other place, whether or not [fol. 42] you limp?

A. I do.

Q. Do you limp all of the time you walk?

A. Yes, sir, more so when I am on uneven walking.

Q. What effect does like out on the road bed, or wherever you may be working, uneven, have upon your feelings in your back?

A. Just in walking it hurts my lower back right through there, my lower back where my injury was.

Q. What is the reason that you limp?

A. It favors my back more to give to it. It hurts where I just have to give to it so it won't hurt so much.

Q. If you bend forward like to pick up something, if you bend forward, does that have any effect on your back?

A. It certainly does.

Q. Come down here, please sir. (Witness standing in front of Jury. Counsel pushing witness forward.) What effect does that have?

A. Well, I just can't get over there and I can't get up when I get over.

Q. Does it hurt you any when you bend?

A. Yes, sir.

Q. In doing your work out there, is that done in comfort?

A. No, sir.

Q. In what respect does it bother you while you work?

[fol. 43] A. In my back and shoulders.

Q. Does it hurt you, is the point?

A. Yes, sir.

Q. Is there ever a time, like you are walking, where you are entirely free of suffering?

A. No, sir.

Q. Now I will ask you in the use of your back—I will ask you—(Counsel pitching key to floor) go down and get that key. (Witness picking up key from floor.) Is that the best you can do?

A. Yes, sir.

Q. Can you do that? (Indicating.)

A. No, sir. I could not.

Q. I am lots older than you are.

A. I can't help that. I might be old someday myself.

Q. Now Mr. Arnold, I asked you a question yesterday and I want to ask you an additional question in connection, I asked you whether you were enjoying good health, good physical health, able to perform labor ten minutes before you got hurt, and your answer was what?

A. I could perform it before I got hurt, yes.

Q. Were you in good physical shape?

A. Yes, sir.

Q. Now in the past, in 1926, did you have an injury to your leg?

[fol. 44] A. I had an injury to my right leg, yes, below my knee.

Q. How long did that bother you?
A. Oh, I was out of service a little over three months.
Q. Did you get over that within six months or a year?
A. I would say six months to a year I was over it, yes.
Q. Did it ever bother you after 1927?
A. I would say no.
Q. That's a year after you got hurt?
A. No.
Q. That's the year Lindbergh flew the Atlantic?
A. That's right.
Q. Totally recovered from it?
A. Yes, sir.
Q. When you were in the hospital in Topeka did they make an effort to build up one of your shoes?
A. They did, yes, sir.
Q. Was that done to see if they could stop the limping?
A. Yes, sir.
Q. Did it do it?
A. No, sir. It hurt my back worse.
Q. Did you ever hurt your back before?
A. No, sir.
Q. Now what wages did you make out there?
A. You mean at the present time?
Q. When you got hurt or now. When you got hurt.
[fol. 45] A. I make $15.92 a day now at eight hours and I believe we have got a four cents raise since I got hurt.
Q. Everybody?
A. That is right, not just me.
Q. Across the board?
A. That's right.
Q. How much per month would be your average earnings?
A. With no over-time I average around $330.00 a month.
Q. With over-time, or what you customarily get for your work, before you got hurt, what would be your monthly wage?
A. Around—I have averaged around $350.00, before I got hurt.
Q. Now that would make about how much a year, so we can get down to figures?
A. About $4200.00.

Q. Four thousand two hundred?

A. That's right.

Q. How much time have you lost away from your work, and not paid by the railroad for it, how much time, since you have been hurt have you lost?

A. Seventy-two weeks.

Q. Just in terms of years, what is that?

A. That would be a year and forty weeks.

Q. Or five months? Close to a year and a half?

A. Well, yes.

[fol. 46] Q. In money that would be how much, since you have been hurt?

A. Six thousand dollars or over.

Q. I believe we, as your lawyers, had you examined by some doctors in Dallas, is that correct?

A. That's right, yes, sir.

Q. And we are the ones who sent you to them?

A. Yes, sir, that's right.

Q. One of those doctors is Dr. Ben L. Schoolfield?

A. That's right.

Q. And he examined you how many different times?

A. Three, I believe.

Q. Can you give me the dates?

A. I may not give the exact day, but I believe that I can give the month.

Q. All right. Give the month.

A. February of '52, and I believe it was June of '53, somewhere in '53, and then last week.

Q. I will ask you whether you had on each occasion three sets of X-rays made?

A. Yes, sir.

Q. The X-ray doctor was Dr. Kahn, wasn't it?

A. That's right.

Q. And you expect both of those men to be witnesses in your trial?

A. Yes, sir.

[fol. 47] Q. I will ask you this one question, do you know any other type of work excepting railroad work?

A. That's all I have done since I was 20 years old.

Mr. Gallagher: You may have the witness.

Cross-examination.

By Mr. Cobb:

Q. Now Mr. Arnold, I have some pictures here. I wonder if you would look at that picture and state whether or not that is a picture of the driveway or walkway, as you call it, and the old depot, there by those railway cars that you have been talking about?

A. Yes, sir.

Q. And that correctly portrays the situation down there as it existed on the ground when you were hurt, is that right?

A. Well it looks like this is rough here, or tore up a little bit there and it wasn't at the time being.

Q. That's the only difference, it is a little rougher right in here?

A. It looks like that may be——

Q. Otherwise it is a correct picture of the surroundings?

A. That's the location, yes.

(Defendant's Exhibit Number D-1, Picture, marked for identification.)

Mr. Cobb: We offer this exhibit in evidence.

The Court: You are not introducing the notation on the back.

[fol. 48] Mr. Cobb: Not introducing the notation on the back, no, sir.

The Court: Any objection by either party?

Mr. Gallagher: None here, Your Honor.

Mr. Smith: O. K.

The Court: All right, let it be introduced.

Mr. Cobb: We offer this as Defendant's Exhibit Number 1.

The Court: There are some notations on the back that are not introduced so don't turn the picture over.

(Defendant's Exhibit Number D-1, Picture, Offered in Evidence and shown at Page 405 of this record.)

Q. Now I hand you this picture Mr. Arnold and ask you if that appears to be the Billings' truck that was involved in this accident?

A. That looks like the truck, yes, sir.

Q. And it's also placed there in that same drive-way or walkway that you testified about here on the diagram, is that correct?

A. It looks like the same drive-way, however, it is not in the location it was at the time I got injured.

Q. But you would say it is the same drive-way and the same truck and the same general location, is that correct?

A. Let me take another look. (Witness looking at picture.) The only thing I can be positive about is that light [fol. 49] post, and that looks right, yes, sir.

Mr. Cobb: We offer this.

(Defendant's Exhibit Number D-2, marked for identification.)

Mr. Cobb: Any objection.

Mr. Smith: No objection.

Mr. Gallagher: No objection.

Mr. Cobb: Defendant's Exhibit Number D-2.

The Court: All right, let it be introduced.

(Defendant's Exhibit Number D-2, picture, offered in evidence and shown at page 405 of this record.)

The Court: I believe they all have notations so that any of them that are given to you unless I state otherwise, don't turn them over.

Q. I hand you here another picture, showing a truck on the same driveway, and showing the old Santa Fe Depot over there in the distance, will you say that that is a correct portrayal of the scene of the accident.

A. That is.

Mr. Cobb: I ask that this be marked.

(Defendant's Exhibit Number D-3, Picture, marked for identification.)

Mr. Smith: No objection.

Mr. Gallagher: No objection.

Mr. Cobb: We offer this as Exhibit Number 3.

The Court: All right let it be introduced.

[fol. 50] (Defendant's Exhibit Number D-3, Picture, offered in evidence and shown at page 406 of this record.)

Q. I show you next here, a picture, does that represent the, I guess it would be the South end would it not, Mr. Arnold?

A. The picture looks like it would be looking South on the West side. That's on the West side of the——

Q. And that little house over there is used by some of the employees, is it not?

A. That's right.

Q. Used as a company office, but that would be the South end of the drive-way that you portrayed here looking South?

A. Yes, sir, looking South. If you have two of them alike that is it.

Q. Just like it.

Mr. Cobb: All right, we ask that this be marked.

(Defendant's Exhibit Number D-4, Picture, marked for identification.)

Mr. Cobb: We offer D-4.

The Court: All right, let it be introduced.

(Defendant's Exhibit Number D-4, Picture, offered in evidence and shown at page 406 of this record.)

Q. Now Mr. Arnold, this injury happened on January 16, 1952 did it not?

A. That's right, yes, sir.

Q. And you went to see Dr. Batson the same day?

[fol. 51] A. Yes, sir.

Q. Now when did you go see your attorneys the first time?

A. It was in February of '52.

Q. February of '52?

A. Yes, sir.

Q. Is that the first part of February?

A. Yes, sir.

Q. In the first part?

A. Yes, sir.

Q. Along the first part. Did you also see Dr. Schoolfield or Dr. Kahn at that time?

A. I did, yes, sir.

Q. Saw both of them then?

A. Yes, sir.

Q. And they conducted their examination at that time, is that correct?

A. Yes, sir, they gave me an examination.

Q. Now how long would you say that Dr. Schoolfield took in his examination of you back there in February of 1952?

A. Both doctors together, it took me all day.

Q. Took you all day?

A. Yes, sir.

Q. Now when was th next time that you saw those two doctors after Februa f '52.

A. Well I seen Dr. Schoolfield different times, but not [fol. 52] for treatment.

Q. But not for treatment?

A. That's right.

Q. Has he ever prescribed treatment for you?

A. Well, that's up to my attorneys to answer that, I believe.

Q. You can answer that question I believe, Mr. Arnold. Has he ever prescribed treatment for you, Dr. Schoolfield?

A. No.

Q. Has Dr. Kahn ever prescribed treatment for you?

A. No.

Q. When was the next time you saw him for an examination?

A. It was up in the summer of '53, I wouldn't say—I couldn't say the exact day or month, somewhere along there.

Q. About a year later?

A. I would say it was a little over a year after I seen him the first time.

Q. How long did Dr. Schoolfield take in his examination at that time?

A. Oh, I expect close to four hours.

Q. Did Dr. Kahn take about the same length of time?

A. Yes, sir.

Q. After June of '53, I believe you stated that the last time you saw your doctors from Dallas was last week, is that correct?

A. That's right.

[fol. 53] Q. Now you have been to see Dr. Batson?

A. Yes, sir.
Q. Here in town?
A. That's right.
Q. And Dr. Dunn?
A. Yes, sir, that's right.
Q. You saw Dr. Delaney up at Topeka, in the hospital up there?
A. He examined me one time, yes, sir.
Q. And Dr. McClanahan, you saw him up there?
A. Yes, sir.
Q. And Dr. Buckner?
A. Yes, sir.
Q. And Dr. Hanna?
A. Who?
Q. Hanna?
A. No, I don't know the man.
Q. Who are some of the other doctors you did see?
A. I saw Dr. Hansen, if that's who you mean.
Q. Hansen?
A. Yes, sir.
Q. You saw Dr. Hansen?
A. Yes, sir.
Q. Now, when those various doctors conducted their examinations of you, did they ask you to bend over similar to the bending over that you did here awhile ago?
[fol. 54] A. Yes, they had me bend over and twist.
Q. They had you turn your neck from side to side?
A. Yes, sir.
Q. They also had you turn your body from side to side, did they not?
A. Yes, sir.
Q. And bend both forward and backward?
A. Yes, sir.
Q. And all of those doctors had the benefit of X-rays, did they not?
A. I would say yes.
Q. The fact is that Dr. Batson took some X-rays the very day that you were hurt?
A. Just of my hand and arm.
Q. He took some more about ten days or two weeks later, didn't he?
A. It was in February. My back and neck was hurting

me and I kept after him to take X-rays and he said "Oh, you don't need it, you are just bruised up and jarred up from the accident."

Q. But he did make some X-rays?

A. He took X-rays after I went to Dallas and had X-rays.

Q. After you went to Dallas and saw Dr. Schoolfield and Dr. Kahn, is that right?

A. Yes, sir, that's right.

Q. And, he took some X-rays of your back?

[fol. 55] A. Yes, sir.

Q. And your neck?

A. Yes, sir.

Q. Up there at Topeka they also took X-rays of your back and your neck?

A. Yes, sir.

Q. Mr. Arnold, you testified awhile ago concerning an accident that occurred in—was that in 1926?

A. Yes, sir.

Q. Were you working for the railroad company at that time?

A. I was working for them, but I was off duty at the time of the accident.

Q. Just explain to the Jury if you will how that accident happened?

A. Well, I was in a car, driving approximately 25 miles an hour, and a fellow with a team and wagon, team of mules hitched to a wagon going down the road, and I started to pass him and I sounded my horn and this fellow happened to be hard of hearing and I had never seen the man before and I didn't know it and I swung out to go around him and he cut right across and headed me off and I gave him one inch more of the road than I should have and the car turned over.

Q. The car turned over at that time?

A. There was a gutter washed out on the side of the road and it snapped my front wheel off, that was back in [fol. 56] the wooden wheel days.

Q. You received a broken leg in that accident?

A. Yes, sir.

Q. Did you not, Mr. Arnold?

A. Yes, sir, that's right.

Q. You filed a suit up in Oklahoma——
A. I did.
Q. As a result of that accident?
A. I did.
Q. Did you receive anything for those injuries?
A. I did, yes, sir.
Q. Just state how much that was, Mr. Arnold?
A. I don't remember to the exact dollars and cents, but I didn't get much out of it, I know that.
Q. Around $1200.00 wasn't it?
A. In the neighborhood of 1200.00, yes, sir.
Q. Now you stated a few minutes ago that you went to the Topeka Hospital in 1953, or was that 1954, for hepatitis?
A. Hepatitis, in '54. I also went there for a check up on my back, as well as hepatitis. I was over the hepatitis when I went up there.
Q. You also stated that you didn't know what hepatitis was?
A. All I know is what the doctor told me.
Q. He told you that it was commonly known as yellow jaundice, didn't he?
[fol. 57] A. No, he said it was similar to yellow jaundice.
Q. But that condition caused your skin to get yellow, and loss of appetite, you felt drowsy and dull, did you not, as a result of that?
A. I got yellow and I lost my appetite for a week, two weeks something like that?
Q. That situation cleared up didn't it?
A. Yes, sir. It was cleared up before I entered the hospital the last time.
Q. Now you belong to a railroad guild or union, do you not, Mr. Arnold?
A. Yes, sir.
Q. And what union is that?
A. Car-Man's Union with A. F. of L.
Q. Car-Man's Union with the——
A. Brotherhood of Railroad Car-Men.
Q. Connected with the A. F. of L.?
A. Yes, sir, that's right.
Q. Now your work is largely based upon seniority, is it not?

A. It is, yes, sir.

Q. The job you carry?

A. Yes, sir.

Q. State who is the senior man here in Lubbock in your particular union or guild?

A. I am.

[fol. 58] Q. And for that reason you more or less pick your job, is that correct?

A. That is correct, yes, sir.

Q. Now, I believe you also stated that you were drawing the same rate of pay now that you were drawing back there when this accident happened, maybe a little bit more, that is correct isn't it?

A. That's right. I believe we got a four cent an hour raise since I had the injury, but in other words, it is considered the same rate.

Q. How long have you been working here in Lubbock, Mr. Arnold?

A. I went to work here November the 30th, 1941, at Lubbock.

Q. And you have known the condition of the yards down there, especially where you worked ever since November of 1941 when you came up here?

A. I sure have, yes, sir.

Q. It is a fact, isn't it Mr. Arnold, that used to be a narrow walkway here?

A. That's right, yes, sir.

Q. Wasn't over two or three feet wide?

A. Not over four feet at the most.

Q. Was it gravelled?

A. Well it was more of clay or caliche, because I know it got muddy. The water would stand on there. It would get muddy in there. It wasn't, in other words if it was [fol. 59] gravel, it wasn't solid gravel.

Q. And it was used for nothing else but a walk-way?

A. That's right.

Q. Now when was that drive-way there widened?

A. I couldn't say exact, but it was in the neighborhood of '47 or 8, somewhere along in there.

Q. But it was widened at that time?

A. I was on duty, I mean I was in service when it was widened.

Q. To the present width?

A. Yes, sir.

Q. Along about that time '47 or '48, Mr. Billings started driving his trucks in there to pick up mail, didn't he?

A. Not when that was first completed, no.

Q. How long after it was first completed before he started that?

A. Well it was soon after, a few months.

Q. And he continued to do that every day almost up to the time of this accident, did he not?

A. They are still driving in there.

Q. Still driving in there. Now on these pictures, I call your attention here to Exhibit marked D-1, and the white building there is the old depot before they put the new brick depot in, is it not?

A. It looks like it, yes, sir.

Q. Now state whether or not on the South side here of the depot, the side facing us, there was a brick sidewalk?

[fol. 60] A. Yes, there was bricks this way.

Q. And there was also a brick sidewalk or a pavement in front of the depot there?

A. Platform as we called it, yes.

Q. Up from, oh, six or eight inches above the level of the ground?

A. Level of which ground?

Q. The level of the surrounding area there.

A. Yes, but not of this road.

Q. But not of this road, but the surrounding area, it was up six or eight inches higher, wasn't it?

A. Yes, along right in here and out here it was probably ten or twelve inches higher.

Q. But the area there in front of the depot was paved with brick, was it not?

A. That's right.

Q. Clear out to the train?

A. That's right.

Q. And that area in front of the depot, or along the East side there according to your diagram was the area that was commonly used by passengers coming in and out of the depot and getting on trains, is that correct?

A. That's right.

Q. And the brick walk-way there on the South side of

the depot was commonly used by persons going to and [fol. 61] from trains, is that correct?

A. To and from their cars to the West side.

Q. To and from the cars to the trains?

A. Yes, sir.

Q. Now it is your testimony that from time to time you have seen the Billings' truck go right through that area, is that correct?

A. Yes, sir.

Q. Did it do that commonly? Is that your testimony?

A. Well, I would say daily.

Q. Did it almost daily, went around in front of this depot there on that brick walkway?

A. I would see them there daily, I would see them on the brick platform, I won't say up there everyday, but I have seen them there lots of times.

Q. Now was it common practice for them to go around in front of the depot there on the brick platform or back out?

A. I have seen them go both ways.

Q. Well which was the more common, Mr. Arnold?

A. Well the common way would be to go ahead. It would save him pulling up and backing up.

Q. Well, what did he do generally?

A. You could never tell.

Q. I say generally what did he do, did he go forward and go across that area there that the passengers used, or did [fol. 62] he back out?

A. Well I wouldn't say which percentage he went the most, but he would go both ways. I have seen him go both ways.

Q. It is your testimony that you knew he did both?

A. I do, yes, sir. I know they go both ways.

Q. Now, you have made some reference here to a flag that you put on one of those cars, what kind of a flag was that?

A. A blue flag.

Q. A blue flag. And which car there did you put it on, one, two or three?

A. It would be the third car, right-hand corner, facing the car, which would be the East side of the South end.

Q. Are you familiar with the rules governing the conduct of Santa Fe employees?

A. Yes, sir.

Q. You have been issued a rule book?

A. Yes, sir.

Q. You passed an examination on various rules for your type of work?

A. Yes, sir.

Q. And you know that one of those rules is to watch for movement of trains, cars and vehicles at all times, do you not?

A. Ordinarily they don't have vehicles out in the train yard.

Q. One of the rules states that though, doesn't it, Mr. Arnold?

[fol. 63] A. Just watch for trains, cars.

Q. Movements of cars and trucks?

A. It don't say trucks. It says cars.

Q. Now you recall giving a deposition in this case along last summer do you not, Mr. Arnold?

A. Yes, sir.

Q. Now at that time you stated, did you not, that when you went into this number one car here, that you went in the North door, is that correct?

A. North door on the East side, yes, sir.

Q. North door on the East side, and that was your testimony yesterday too, wasn't it?

A. Yes, sir. That's right.

Q. You also testified at that time that you noticed this Billings' truck here loading mail, did you not?

A. I did, yes, sir.

Q. And you came down through these cars and came out this door here on car number 2?

A. That's right, yes, sir.

Q. That would be——

A. The second car.

Q. —the second car and that would be the door furtherest to the South?

A. The South door on the West side of the second car.

Q. Now after you came out of that door, what did you [fol. 64] do, Mr. Arnold?

A. I walked down to this third car, I had to get in it as well as the others. I walked down to this third car and

the door was closed. I got far enough toward the center of the car that I could see both doors was closed. The brakes was in passenger service, the air brakes, and they had to be changed to freight service on account of this car going back to Dallas daily. I reached under there and closed the valve that runs from the triple valve on a line that goes to the reservoir tank. I walked back to the door, it would be the North door on the West side of the third car. As I was walking back I was facing the truck. It was still there standing at an angle position. I reached under the car arm length with a claw hammer in my hand and I had this hand on the step of the car, and I reached in under there and opened that valve. I was not under the car no more than just my arm and hammer.

Q. And then what happened?

A. I opened that valve and the air blowed out and I just stepped, turned and walked down—I had to walk around the car, walked South and had to walk around the car to get on the other side, and when I was walking there I got down to this West door—South door on the West side of the third car, I was hit in the back by this truck.

Q. Now, Mr. Arnold when did you notice that the mail was piled so high in that truck that the man couldn't see out of the window in the back of his cab?

[fol. 65] A. When I got in the first car he was standing in the back end of the truck and the railroad men was throwing mail out to him in the truck and he had it stacked up like that in the truck at the time being, and when I got out of the South door on the West side of the second car he was still standing on the back end of the truck throwing mail back up in there.

Q. That made a particular impression on you at that time, is that right?

A. Well I don't know whether it was particular or not but he was there working.

Q. Now how long a time would you say it was from the time you noticed his truck still standing there until you were hit?

A. It was just a matter of a few seconds.

Q. In other words the truck must have been running when you saw it last. Is that your testimony?

A. I wouldn't say whether the motor was running or not.

Q. You couldn't hear it?

A. If it was running it was running quiet. I won't say whether it was or wasn't running while he was loading the mail.

Q. But when you turned your back on that truck and started walking South, which part of the drive-way were you in?

A. I was—it was on the East part of the walk-way, and my left side would clear the side of the car approximately two feet as I walked along.

Q. Now after you were hit, and after you rolled over as far as you could out of the way of the truck, when it [fol. 66] ran over your arm, were there any skins or abrasions on your body anywhere?

A. I had the hide busted right there on my wrist and it was bleeding, and the left side of my face was skinned. It didn't bleed, but it was ruffled up on my face. There wasn't no blood on my face.

Q. The left side of your face here was skinned?

A. Yes, sir, that's right.

Q. When you went to see Dr. Batson did you call his attention to that?

A. I didn't know it was skinned right then, and I didn't say nothing to him about it.

Q. It wasn't noticeable?

A. Well, it was noticeable I suppose, but my face was dirty, and I guess he never noticed it being skinned. I didn't know it was skinned right then.

Q. What do you mean when you say you guess he didn't notice it was skinned?

A. He was looking at my arm.

Q. Do you know that Dr. Batson didn't notice that it was skinned?

A. No, I don't know that he didn't notice it and I don't know that he did notice it. If he did notice it he didn't say nothing.

Q. Now, you noticed the end gate there on the back of the [fol. 67] Billings' truck, would you say it was in approximately the position here shown on Exhibit D-2 at the time it hit you?

A. Is that end gate level there?

Q. I believe it is tilted just a little bit, Mr. Arnold.

A. It is a poor picture you can't hardly tell. No, that is not the position the end gate was in when it hit me.

Q. What position would you say it was in when you were hit?

A. The end gate was hooked up at approximately a 45 degree angle, hooked with chains on each side to hold it up.

Q. Approximately a 45 degree angle?

A. Yes, sir, approximately that. I wouldn't say exactly.

Q. And, it is your testimony that that end gate hit you in your shoulders first.

A. Right across the shoulders, that's right.

Q. And then after it hit you across the shoulders there, well what happened?

A. It knocked me about ten or twelve feet.

Q. Did any other part of the truck hit your body at that time?

A. The corner of the truck, or the tail light hit me in my lower back, I don't know which it was, it could have been either one, either the tail light or the corner of the truck, I wouldn't say which.

Q. In other words, the tail gate after hitting you, hit you on this part of the back and then some other part hit you down here?

[fol. 68] A. That's right.

Q. Is that your testimony?

A. That's right.

Q. And it knocked you ten or twelve feet?

A. That's right.

Q. Now when you say it knocked you, did you fall down or did it push you?

A. Up like that (indicating).

Q. What is that now?

A. It just raised me over like that (indicating).

Q. You mean it shot you through the air ten or twelve feet?

A. That's right, and I come down on this elbow and shoulder and this hand, and my knees hit last.

Q. Did it take your feet off the ground?

A. It certainly did. It took me clear off of the ground.

Q. Took you clear off of the ground, and knocked you ten or twelve feet and you hit on your elbow?

A. On my right elbow, not my left.

Mr. Cobb: I believe that's all.

The Court: All right, Mr. Smith, you may cross-examine the witness.

Further cross-examination.

By Mr. Smith:

Q. Mr. Arnold, the time that you have been working out there for the railroad company, you had, I believe you said, seen these Billings' trucks come into that area daily [fol. 69] practically all of that twelve years, something like that.

A. No, I didn't say twelve years.

Q. Well, how long have the Billings' trucks been hauling mail out there since you have been there?

A. He's hauled mail a lot longer than he's drove up there.

Q. From the time this walk-way was built, had it existed on January 16th, 1952, had you seen them using that walk-way or road-way there?

A. I had seen them, yes, sir.

Q. And you had, at least on many occasions seen them drive in and back out?

A. That's right.

Q. And, did you have any knowledge of why they would go to the trouble of backing through that long narrow drive-way instead of driving out forward?

A. It looks like they would go forwards instead of backwards, it would be a whole lot shorter distance to have went forward out of there than to back up about half the distance.

Q. You never did know why they were backing, is that correct?

A. Yes, sir.

Q. All the time you worked there?

A. That's right.

Q. You didn't know that they had instructions that they should not drive forward in this area in and around the depot?

[fol. 70] A. I know that they did drive over it.

Q. You didn't know that they were told not to drive in there and that they should use only this drive-way?

A. I didn't know they were told that, but I know that they did drive over it.

Q. When you drew this diagram yesterday, I notice that you drew a line across here, what is that? At the North end of the drive-way, what is that line, what does that line represent?

A. Which line do you mean?

Q. I mean this line at the North end of the drive-way.

A. That is where the bricks started at that time, runs up against the brick.

Q. The brick, when you hit the end of it, you go right up on that brick?

A. Well, it was level with the bricks.

Q. This is level across here, there was no off-set at all?

A. That's right.

Q. And there was nothing in there to keep that truck from driving through, is that your testimony?

A. That's right.

Q. And was this a road up here?

A. No, not in there, no, sir.

Q. Was this a road in here?

A. No, that was a platform. They used it for a road.

[fol. 71] Q. The only roadway ended right here, didn't it?

A. That was a walkway, it wasn't a roadway.

Q. You say it was not a roadway. After it was widened, you said it was about '47 or 8——

A. It was widened for the passengers to board the night train that used to leave from the pullman spur, and they put the lights up there to make it light on that side, to keep them away from the other side of the tracks.

Q. Now Mr. Arnold, you stated awhile ago that you had some conversations with somebody with the railroad about how dangerous it was for a truck to be backing along that area, didn't you?

A. That's right, yes, sir.

Q. So, you had observed it, and had consciously thought about that as dangerous, hadn't you?

A. Everybody else thought it, yes, sir.

Q. You knew that that was going on daily, those trucks coming in and backing out?

A. I didn't know they backed out every day but I knew they went both ways.

Q. Now, each morning when you went over to this area, did you go over there about every morning about the same time?

A. No, it wasn't the same time every morning. At times I'd go over there there was no truck there. At times I was there before he got there and at times after he was gone.

[fol. 72] Q. But on many occasions you had been there of course and observed trucks coming in and out?

A. I observed trucks coming in and out from different locations of the train-yard.

Q. Have you had any conversation with Mr. Raymond Billings here, about the necessity for you to watch for those trucks?

A. I did not with him, no.

Q. Did you talk to the railroad about it?

A. I did, yes, sir.

Q. And as you say that drive-way is about ten feet eight inches, is that correct?

A. Yes, sir.

Q. You think the truck is about eight feet wide?

A. I would say eight to eight and a half, whatever is a standard truck I suppose. I don't know the exact width of it, but standard width truck.

Q. And you placed along there a tree and is there a telephone pole along there that you had to watch out for?

A. I haven't got no tree on there nor no phone pole. I have got two light posts.

Q. Two light posts, and a man backing up there would have to be a pretty good driver to even stay on that road, wouldn't he?

A. That's right, he would.

Q. And you knew that?

[fol. 73] A. Yes, sir.

Q. At the time you were over there that morning?

A. I knew the truck was there when I was there that morning, yes, sir.

Q. And it was there when you got there?

A. It was there before I got there.

Q. Before you got there, so if you put a blue flag out on that third car you put it there after the truck was already in there, didn't you?

A. Well, it wouldn't necesarily be after, it could be before.

Q. Didn't you say the truck was in there when you got there?

A. It was there when I come across to work on the car, but it wasn't there when I flagged the car.

Q. When did you do that?

A. About twenty minutes before that.

Q. You walked over and flagged it and walked back?

A. I certainy did, yes, sir, and went ahead and done some other work and come back over there.

Q. Was the truck there at the time you walked over and put the flag on there?

A. No, sir. I waited for a switch engine to cut loose from the cars, and I put the flag on when they left, and I went on about my work and come back.

Q. Now Mr. Arnold, you gave your testimony here by deposition on April 21st, 1954, didn't you, sir?

[fol. 74] A. Somewhere about that date.

Q. And you recall that down here in the Court Room?

A. Yes, sir.

Q. And you told at that time how—what you were doing just prior to this accident, didn't you?

A. Yes, sir.

Q. And you were asked the question about whether or not—you were asked this question——

The Court: Identify it.

Q. Page 25 (Mr. Smith reading from deposition.) "In other words, was it necessary for you to get under the car with most of your body, is that correct?" Your answer: (Mr. Smith reading.) "Some cars I did, but this particular car it wasn't, to get clear under it."

A. That's right.

Q. That was your answer?

A. Some cars you have got to get under and some cars you have just got to get down and reach under.

Q. On this occasion you had to get partially under this car?

A. Yes, sir, that's right. Had to get my arm under it.

Q. And of course you had to stoop down too because it was low where you were working?

A. That's right.

Q. You stooped down to where you were not more than waist high altogether at the time you were working under [fol. 75] there, weren't you?

A. Approximately waist high.

Q. You were partially under the car, weren't you?

A. Just my right arm.

Q. You reached all the way back under there?

A. I did, yes, sir.

Q. Where were you looking while you were doing that?

A. I looked just before I reached, as I was reaching under there.

Q. Where did you look?

A. I looked up North toward the truck.

Q. And what did you see?

A. The truck still sitting there.

Q. Had it moved any?

A. No, sir, there was still a man on the back of it.

Q. From that time on, Mr. Arnold, did you ever again look to that truck before you were struck?

A. No, sir, I turned and went on about my work.

Q. You never did look to see where that truck was at any time from that point on did you?

A. I couldn't watch the truck and my work. I was watching my work.

Q. Now on page 26, in your deposition, you stated: "I stepped back then about, oh, three or four steps, and I opened the valve on this air-drum or reservoir at the end of this line that I just closed. Well, it had a half-inch valve on there, it had air pressure there, and when I opened [fol. 76] that valve of course, naturally, the air blowed out and it blowed right square into the ground on that particular car. Some of them don't, but that one happened to. Well, when I closed this valve here before I opened the other one, this truck was still setting up here, and——" "Did you notice that truck before then?" "Yes. When I got in at that car door on that side they was loading mail

out of that car into the truck on this side."

Now, that was your testimony back when your deposition was taken?

A. That's about right, yes.

Q. That's correct, isn't it?

A. Yes.

Q. Page 29 (Mr. Smith reading.) "Well, Mr. Arnold ——" Starting at the top of the page you were telling about where, about when you walked South or East. (Mr. Smith reading.) "—and this truck came backing up there unbeknownst to me, on account of the whiff of this air, and I was doing my regular work."

Now, the only thing in the air on that occasion was the dust that had been created by the blowing of that valve into the ground, is that correct?

A. It didn't last long, just lasted a second.

Q. I didn't understand you.

[fol. 77] A. That dust wasn't up in the air like that, it was just only up about waist high or something like that and just a flash of it. It didn't last.

Q. Now will you explain to the jury what you meant when you said "this truck came backing up there unbeknownst to me on account of the whiff of this air," what does that mean?

A. Well, the truck came backing up. When I opened that air valve on this reservoir tank, it had air pressure, and of course it blowed loud for just a second, not over two seconds, and gradually weakened down. As it—when I first opened it, it blowed, hit the ground, dust flew up for just a second, and I walked off and left it, but where the truck hit me there absolutely was no dust, and there was not dust at any time enough to keep anybody from seeing.

Q. But you stated when your deposition was taken that it was unbeknownst to you on account of the whiff in the air, that is what you said then isn't it?

A. If I did, I didn't understand your question.

Q. You were talking. You heard me ask the question, that is page 29. Is that the only explanation you have for that statement?

A. Well the dust never did—never was so strong it put me out of sight or anything.

Q. As a matter of fact Mr. Arnold, isn't it a fact this is the way it happened? You didn't know where the truck [fol. 78] was just before you got struck.

A. Why no, not just before I got struck when he was up there sitting, when I seen him last.

Q. And the reason you didn't know where it was, you had forgot to even look to see where the truck was, isn't that correct, sir?

A. I did not forget, no, sir. He was sitting there backed into the side of the car, and you, and anybody else would know that he had to pull forward to get away from that car. When he pulled forward why didn't he go around the depot instead of backing up.

Q. All right. Then your answer is the reason you didn't look for that truck backing through there is that you thought he was going forward, is that correct, as he had always done? Is that what you are saying?

A. He could have went forward, yes.

Q. Well, were you expecting him to go forward?

A. I certainly was, at the angle he was setting, yes, sir, anybody else would have thought it.

Q. As a matter of fact, Mr. Arnold, just about the time you opened that valve and created that dust and that loud noise, you turned around with your back to the truck and got out from under that car and it happened like that, didn't it?

A. I wasn't under the car.

Q. You were partially under it?

[fol. 79] A. Partially under it.

Q. You moved away from the car in this dust, while that loud noise was going on and that is about the time the truck hit you?

A. No, I walked about nine or ten steps before the truck hit me.

Q. You are positive about that?

A. I am positive about that, yes, sir.

Q. But you didn't see the truck until he hit you, from the time you had last seen it sitting there parked?

A. From the time I last seen it parked, I didn't see it until after it hit me.

Q. Now, Mr. Arnold did you talk to Mr. Billings here about it?

A. I have never talked to Mr. Billings about it, no, sir.

Q. You are acquainted with Mr. Billings, are you not?

A. I know the man, and I guess he knows me about like I know him.

Q. You have seen him out there on many occasions, haven't you?

A. That's right.

Q. And out there on that occasion, just before you had your accident, you knew then that the driver of that truck couldn't see through the back glass, because you already made a mental note of the fact that the glass was covered?

A. That's right.

Q. And you knew that. And you knew at that time that that truck backing through there had a very small area in [fol. 80] which to maneuver, and you had been warned time and time again, and had discussed it with the railroad that you must watch at all times for those trucks?

Mr. Bean: Your Honor, we object to that, that is too many questions.

Mr. Gallagher: And he has not laid a predicate that he was ever warned by anybody about watching of the trucks. The rule he referred to was brought out by Mr. Cobb, is a railroad rule to watch out for trains and cars, meaning railroad cars, not trucks.

The Court: All right. Rephrase the question. I sustain the objection.

Q. Mr. Arnold, you had been warned, had you not, by the railroad of the necessity for watching at all times for trucks in that particular area there because of the backing there?

A. No, sir, I had not been warned by any official.

Q. You had warned the railroad about the safety of it though?

A. I had warned the agent, yes, sir.

Q. And, you had full knowledge of the danger of it?

A. Why, of course, there is danger around any railroad.

Q. And you knew how those trucks were constructed didn't you, about the size of the van, how big it was?

A. Yes, sir.

Q. You had seen them many times, hadn't you?

[fol. 81] A. Yes, sir.

Q. And, of course, a man backing a big truck like that

couldn't see an object that was suddenly in the road directly behind him, could he?

A. Why would a driver be backing if he couldn't see where he was going? In railroading there is a man on the end of each car——

The Court: Just answer the question.

Q. If a man suddenly stepped from under that car, directly back of that truck, even with those rear view mirrors, nobody could see him from the cab, could he?

A. That's right. Not from a short distance, no.

Q. You were certainly in a short distance of that truck when you got hit, weren't you?

A. Reasonably short, yes, sir.

Q. Now, you stated yesterday that if you had this to do over again and you could go back out there and do this same thing over again, you wouldn't do one single thing different from what you did it on that occasion. Is that still your answer?

A. I would work exactly like I worked it that day. If that truck was setting there working like he was, I would work like I was.

Q. You wouldn't keep any more look out for that truck than you did on that occasion?

A. I can't watch trucks and watch my work, no, sir.

[fol. 82] Q. On February 2nd now—the only day that you were off work in 1952 in February, was February the 2nd, is that what you stated?

A. The 26th, I believe it was.

Q. Well, up until the 26th, the first part of February you were off one day, is that correct, off one?

A. Not the first part, no.

Q. Well were you or not, off work on February 2nd?

A. I was, but that was my off day.

Q. On February 2nd, is that the day you went to Dallas and hired your lawyers in this case?

A. It was on my off day that I was down there.

Q. Well, did you do it on February 2nd?

A. Can I look in my books?

Q. Yes, sir. Of 1952?

A. February the 2nd was on Saturday. That was my off day.

Q. The first day you missed then from work was what, the latter part of February?

A. February the 26th, like I stated before.

Q. All right, now, on February the 2nd you went to Dallas and employed your attorneys to file this law suit for you?

A. That's right.

Q. On that same day you went to the doctors that you mentioned, Dr. Schoolfield and Dr. Kahn?

A. That's right.

[fol. 83] Q. And you say they spent practically all day checking you over?

A. That's right.

Q. At that time you hadn't lost any time from work, had you?

A. Only part of the two days to start with.

Q. Part of the 16th and 17th?

A. That's right.

Q. You went to work at ten o'clock on the 17th. Now Mr. Arnold, you noticed, of course, on that truck that there was mirrors, rear view mirrors, on both sides, both the East—both the left and the right, didn't you?

A. I knew there was one on the left. I was positive of that, but the right I am not positive, but according to the law there is supposed to be.

Q. You are not sure it was on the right?

A. I am not positive of it.

Q. But you don't have any reason to say that there wasn't any rear view mirror there?

A. I didn't say that there wasn't.

Q. Well in your pleading here it states that they didn't have sufficient rear view mirrors, that is correct, isn't it?

A. Well, it is correct in a way, yes.

Q. Because you didn't know for sure, is that the reason?

A. If he had rear view mirrors and wasn't using them they must not have been in the correct position.

Q. Do you have any reason to believe that the man [fol. 84] operating the truck on that occasion didn't have brakes?

A. I couldn't say nothing about his brakes, whether he had them or didn't have them.

Q. It has been about—considerably more—nearly three years since this accident happened, lacking two months, hasn't it?

A. That's right.

Q. And you, of course, could be mistaken about whether you took one step or four steps or seven steps before you got hit?

A. I know the exact distance from the spot on the car where I walked to where I was hit and I measured the side of the car and I know.

Q. You know exactly how many steps, just exactly the way you know how many pills you took up there at the hospital, is that it?

A. That's right.

Q. Do you customarily measure those things when accuracy will count, is that right?

A. Well, I measured them different times.

Q. Now, you said there was room for the truck to turn around up there at the North end of that driveway, you mean he could have driven up there on that passenger area and turned around, is that what you mean?

A. He could have turned out there in front of the depot and backed up a time or two and turned around, he could have done it, or he could have went on around. He could [fol. 85] not turn around just on this drive-way I know when it is ten feet eight inches wide. He couldn't turn around on that.

Q. If he went around on the other side he would have had to jump off of a bluff to get out of that area, wouldn't he?

A. At that time there was a little jump off there, yes, down on the far side. He had jumped it many times either on or off.

Q. With this big old truck, you have seen him do that?

A. Yes, sir.

Q. You have worked regularly on the job that you have since about what date, the last time you went back to work regularly?

A. I went back May the 10th of this year.

Q. Now you were told were you not, Mr. Arnold, that as a result of this automobile accident that you had one leg was shorter than the other?

A. I was what?

Q. That your right leg is shorter than your left as a result of the automobile accident, is that right?

A. I have had one doctor tell me that, yes, only one.

Q. What—are you having any trouble with your hand and arm, the one you say he run over?

A. Well when I lay down to sleep or sit down, a lot of times my arm and hand goes to sleep, so do my legs.

Q. You don't have any pain in that hand and arm?

[fol. 86] A. Well, not too much pain, that one finger there I have a knot on it as you can plainly see and I have a knot right there on the back of my hand caused from this accident and injury.

Q. You are able to use your right hand and right arm all right aren't you?

A. I might not use them all right, but I think I am doing pretty good, but not like I used to.

Mr. Smith: I pass the witness.

The Court: Do you have any further questions?

Mr. Smith: No, sir, I pass the witness.

Mr. Cobb: I would like to ask one or two questions.

The Court: All right.

Further cross-examination.

By Mr. Cobb:

Q. How much do you weigh now, Mr. Arnold?

A. About a hundred and eighty.

Q. A hundred eighty. About five pounds lighter than you were when this accident happened?

A. Approximately that, yes, sir.

Q. It is true is it not, Mr. Arnold, that you have walked with a limp for, oh, some twenty years or thirty years, haven't you?

A. No, sir, I have not.

Q. How long have you walked with a limp?

A. Since January of '52.

Q. You never limped any before January of 1952?

[fol. 87] A. Oh, when I first had my leg broke, when I went to walk on it I limped there for awhile on account of it was weak, but after that it was all right. I never limped.

Q. In your walk it was never noticeable at all that you had this injured leg?

A. No, sir, it didn't bother me whatever.

Q. It wasn't noticeable to anybody else as far as you know?

A. That's right.

Q. Did you tell these doctors down at Dallas, Kahn and Schoolfield, that you were in this automobile accident in 1926?

A. I am not positive whether I told them or not, but I believe I did.

Q. You believe you did.

Mr. Cobb: That is all.

Redirect examination.

By Mr. Gallagher:

Q. One question I neglected to ask you, Mr. Arnold, on prior occasion or occasions, when the truck of Mr. Billings backed out have you ever at any time before you got hurt seen men posted on the rear end gate, running board, or end gate, or the rear of the truck to guide it in coming back out?

A. At times when there was two men with the truck there would be a man standing on the back end when they backed out, yes, sir. He would ride it all the way to the Post Office.

Q. What doctor told you you had one leg shorter than the other?

[fol. 88] A. Dr. McClanahan at the railroad hospital in Topeka, Kansas.

Q. And, I believe you said he tried to build your shoe up?

A. He built my shoe heel up a quarter of an inch or five-sixteenths, whichever it was, it was either a quarter or five-sixteenths.

Q. Did it help you?

A. No, sir, it did not.

Q. Did it make you worse?

A. It did, yes, sir.

Q. Did you limp before you got hurt?
A. No, sir.

Mr. Gallagher: That is all.

The Court: Any other questions from either of you gentlemen?

Mr. Cobb: No, sir.

Mr. Smith, No, sir.

The Court: You may step aside.

Dr. S. H. Kahn having been first duly sworn testified on direct examination by Mr. Gallagher as follows:

Q. Your name is Dr. Kahn?
A. Yes, sir.
Q. Your initials are what?
A. S. H.
Q. Your first name is what?
[fol. 89] A. Samuel.
Q. Sam Kahn?
A. Yes, sir.
Q. You live in Dallas, don't you?
A. I do.
Q. You are a physician, a doctor?
A. I am.
Q. You are a graduate of an accredited medical school?
A. I am.
Q. And may I please ask your age?
A. 58.
Q. What year did you graduate from medical school?
A. 1921.
Q. And that is about 33 years ago?
A. Yes, sir.
Q. Is my arithmetic about right?
A. About right.
Q. And have you been following your profession since that time?
A. I have.
Q. What is a diagnostic doctor? One in diagnosis?
A. Diagnosis, well that is the system of trying to find out what is wrong with a man who has a complaint, medical complaint.

Q. Have you, in the practice of your profession, followed any form of specialty?

A. Yes, I do internal medicine and diagnosis.

[fol. 90] Q. Do you include in your diagnosis the X-ray?

A. I do.

Q. Do you take a few or a large number of X-rays?

A. Well, quite a few.

Q. Do you receive referred patients from other doctors on X-rays?

A. I do.

Q. What school did you graduate from?

A. The Washington University Medical School.

Q. Where?

A. St. Louis.

Q. Now doctor in the practice of your profession, I will ask you whether or not you regard yourself as qualified to both take and read X-ray pictures?

A. I do.

Q. Over what period of time have you been doing that?

A. Well, ever since I was an assistant resident in medicine at the Barnes Hospital in St. Louis.

Q. What is a resident in medicine?

A. Well, that's at least a second year, interne year.

Q. You own your own equipment, do you?

A. I do.

Q. Doctor, this is Mr. Arnold here, did you receive this patient from Mr.—from Dr. Schoolfield for X-ray work?

A. I did.

[fol. 91] Q. Did you take X-rays of various parts of his body?

A. I did.

Q. Will you give me the date of your first X-ray examination of him? Just lay the X-rays out. We will need them in a second.

A. February 2nd, 1952.

Q. What part or parts of his body did you X-ray then?

A. I took X-rays of his neck, spine, thoracic spine, that is the upper spine, elbow, hand, and lower spine.

Q. Now, did you at a later date X-ray him?

A. I re-X-rayed him on June 12th, 1954.

Q. The same areas?

A. Except I did not do an elbow or a hand.

Q. Did you at a later date X-ray him?
A. I X-rayed him the third time November 19th, 1954.
Q. The same areas or different?
A. The same areas.
Q. Excepting the hand?
A. Elbow and hand.
Q. Doctor, I will ask you to please take out the first set of X-rays. Start with the hand, neck, mid-back, lower back, in that order.
A. In what order?
Q. Well, any order you care. I am not dictating—I suggested the hand first, then the neck, then the mid back, [fol. 92] then lower back. In the interest of time, did you actually take each and every one of the X-rays you have with you?
A. Yes, I did.
Q. Do they represent portions of Mr. Arnold's body?
A. They do.
Q. Now were they taken accurately, to correctly portray the picture so taken, the parts so taken?
A. They were.
Q. Each and every one of them?
A. They were.
Q. Did you develop them yourself?
A. No, sir, but they were developed by my technician.
Q. Did you supervise the development of them?
A. Yes, sir.
Q. Do you know that they are correctly developed?
A. They are.

Mr. Gallagher: We will offer in evidence as Plaintiff's Exhibit Number 1, the same being a picture of the hand.

(Plaintiff's Exhibit Number 1, X-ray, marked for identification and offered in evidence.)

Mr. Gallagher: Come down here. (Witness standing in front of view box.)

Q. That is the elbow?
A. That is the elbow.
[fol. 93] Mr. Gallagher: Plaintiff's Exhibit Number 2, the same being a picture of the right elbow.

(Plaintiff's Exhibit Number P-2, X-ray, marked for identification and offered in evidence.)

A. (Witness handing X-ray to Counsel.) The neck.

Mr. Gallagher: Plaintiff's Exhibit Number 3, the neck.

(Plaintiff's Exhibit Number P-3, X-ray, marked for identification and offered in evidence.)

A. (Witness handing Counsel X-ray.) The thoracic spine.

Mr. Gallagher: Plaintiff's Exhibit Number 4, the thoracic spine.

(Plaintiff's Exhibit Number P-4, X-ray, marked for identification and offered in evidence.)

A. (Witness handing X-ray to counsel.) Lumbo sacral.

Mr. Gallagher: Plaintiff's Exhibit Number 5, lumbo sacral.

(Plaintiff's Exhibit Number P-5, X-ray, marked for identification and offered in evidence.)

Q. Now doctor the picture you have placed in the screen is Plaintiff's Exhibit Number 1, the hand. That is the right hand?

A. Right hand.

Q. Does it show anything abnormal?

A. Yes, he had a little fracture of the distal end of the first phalanx of the middle finger, right there, a little piece [fol. 94] of bone broken off right there.

Q. A fracture, is that a break?

A. A break.

Q. Like you break a match?

A. Yes, chip it out.

Q. Anything else that you desire to state about that?

A. Yes, sir, he had a small fracture at the base of the first metacarpal bone, showed a little piece knocked out. The base of the second metacarpal bone contiguous to the thumb is rough, built up new bone formations, indicating injury.

Q. Any other reading, doctor?

A. That is all on that.

Q. Set it aside, please. The elbow, which is Plaintiff's Exhibit Number 2, is there any abnormal reading there?

A. I didn't find any abnormalities of the bone in this picture.

Q. All right. Take the picture. Plaintiff's Exhibit Number 3, the neck. Will you please give your reading of the neck picture?

A. Yes, sir, this is a side view of the neck, and it shows a small fragment of bone right at the bottom of the sixth cervical vertebra, a little piece of bone chipped off. At the same time the width of the vertebra is narrowed as compared to its neighbors, which indicates it has been injured or compressed.

Q. Have you, at my request on the date of your last examination of November 1954, undertaken to make a manipulation of the neck?

[fol. 95] A. I did.

Q. What was the result of that physically, the physical result of it?

A. The man has spastic muscles that hold his neck rigid. If you force it past a certain degree he has pain in the back of his head, and his neck.

Q. Does he enjoy the full movements of the neck?

A. He does not.

Q. Take the next picture, the thoracic vertebra.

A. This is a semi-lateral view of the spine, mostly the ribs—it is part of the rib cage. This is the backbone, and it shows wedging or compression of this vertebra right here and that, which is the ninth thoracic vertebra. It is definitely narrower than the one below it, which it should be a little bit, but it is also quite narrower than the one above it. It should be wider than the one above it. There is compression of the ninth thoracic vertebra. In addition to that it shows a minimal or very little minimal degree of hypertrophic bone changes of the vertebrae from the eleventh to the third, which is in the nature of sort of a hypertrophic bone change, as you would see in hypertrophic arthritis, a small amount.

Q. May arthritis be aggravated by injury?

A. Yes.

Q. A man that complains about inability to work with hands above his head, is there any relationship between

that inability to work with hands above head, and the con-
[fol. 96] dition you see on the ninth thoracic vertebra?

A. Yes, sir, this bone was damaged—is damaged, and nature tries to splint, won't let it move. There are a great many attachments or ligaments and muscles to these thoracic vertebrae, the shoulder muscles, the arms are attached indirectly to it. The erector muscles, to keep the spine up, or the flexor muscles, they are all directly associated with the vertebra, because they are attached to it. Now, this is a damaged vertebra and nature tried to splint it. There is fibrous tissue around it which is susceptible to injury much easier than normal bones. The muscles are holding the backbone rigid and they get tired and spastic all the time, they tire out at any unnecessary movement, or any movement that disrupts this status quo, or that position of the bone causes pain. He has spastic back muscles along with this.

Q. When you have a spasticity in the muscles of the back does that indicate the presence or absence of pain?

A. It indicates the presence of nature's attempt to splint, to keep from having pain.

Q. Would you expect a man with that back to hurt on attempted use?

A. Yes, it is like this, it is prone to result in pain, if he uses it to any extent past a minimal or a restricted activity.

Q. Would you expect a man with that condition of the body of that vertebra, would you expect him to walk more
[fol. 97] stooped than he had before——

A. Yes.

Q. —he got it?

A. This is narrow, and the result is that it will buckle over forwards, he will get round shouldered. He tilts forward at this point because the body of the bone is gone.

Q. If you have the presence of the arthritic changes to which you referred a few moments ago, if that such a man would attempt to use his back in that area, would use have a tendency to help or to aggravate arthritis?

A. Well—ask that question again?

Q. Will use help or hurt him if he has got arthritis there?

A. Well use would—strenuous use would tend to harm him or hurt him.

Q. Is there anything known to the medical science that could surgically or otherwise correct that condition of the ninth thoracic vertebra?

A. No, this is permanent. That change is complete. The bone is gone and it will stay that way from now on. There is no means available to build new bone.

Q. Now if there be any changes in the future in the physical contour of that bone as it exists now, will it be for better or worse?

A. It will probably be for the worse. This has a natural [fol. 98] tendency to get narrower.

Q. Is there any other remark that you desire to make in respect to that picture, doctor?

A. I believe that is all.

Q. Take the next picture, Number 5, it is a picture of his lower back. Will you put your ruler on the sacrum?

A. (Witness pointing.) That's part of it there.

Q. Will you point out the fifth lumbar vertebra?

A. This is the fifth lumbar vertebra, this is the fourth, this is the bottom edge of the third.

Q. Is that what is—people commonly or often refer to as the bone—the tail bone where you sit down?

A. No, the tail bone is down lower, the coccyx.

Q. Will you give your reading of the top of the sacrum and the fifth and fourth lumbar vertebrae?

A. He has a small amount of lipping, a little spur formation of the antero-inferior of L-4, lumbar 4 and lumbar 5, very minimal of the superior margin of L-5. The space between the sacrum, this big bone here and the fifth lumbar vertebra is considerably narrower in the back, compared to the one above it. That means the intervertebral disc, which is a shock absorber, or the tissue in between these bones to keep them separated, has been squashed down for some reason or other. It is narrower and at the same time overriding of the articular facets between the sacrum and the fifth lumbar vertebra. These bones have attachments, [fol. 99] something like this. There is a little space there, but the bones, the articular processes are something like that. In his case it is pushed down in an abnormal position.

Q. Whenever you lower the fifth lumbar—the body of the fifth lumbar, and you say compresses the space, the cartilege space in between the dark portions there, I will

ask you whether or not such a condition is calculated reasonably to produce suffering.

A. Yes. This sharply limits a man's ability to bend, twist, and that is the main weight bearing part of the spine. All of the weight bearing is above this point here. This is the greatest point of weight bearing.

Q. The dark circular space on the back of the fifth lumbar vertebra, where my ruler is pointed, is called what?

A. That is the foramen.

Q. Do you have any reading with reference to that?

A. Well, it looks a little bit narrower. In other words, the opening through which the nerves come out looks a little bit smaller than it should be and that is because of this overriding of the facets which holds down that little opening.

Q. Aside from surgery is there any way of correcting that lowered or compressed space there?

A. No, that's permanent. That is deterioriated and is disappearing. You can't replace that. That is permanent. [fol. 100] Q. Will you—any other reading you desire to make with respect to that?

A. No, sir.

Q. Will you take your second group of X-rays of the—— I think it was June 1953?

A. This is June 12, 1954.

(Plaintiff's Exhibits Numbers P-6, P-7, P-8, X-rays, marked for identification and offered in evidence.)

Q. As before, in this group, you didn't include the hand?

A. Didn't include the hand or the elbow.

Q. First, is the neck?

A. The neck. This is June 12, 1954. That shows that little fragment of bone which is now a little bit bigger. It has created an abnormal condition there and nature is trying to wall it off. There is a little more calcium around it. It looks a little bigger too. The narrowing of the body is still present.

Q. Any more or any less?

A. About the same I would say.

Q. Is there any other reading on that picture different from the first one?

A. I think that is about all.

Q. That white spot there doesn't mean anything, does it?

A. No, that is part of the bone of the swallowing apparatus higher up.

[fol. 101] Q. That doesn't mean anything?

A. That doesn't mean anything. That hasn't anything to do with it.

Q. Your reading, as I understand it, so it will all be clear is referable to the end of my ruler, that segment of bone there?

A. Yes, sir.

Q. Together with the body there?

A. Yes, sir.

Q. That should have a clear contour all the way around, in a healthy bone?

A. It should be clearly defined and outlined just like the one below it, sharp edges.

Q. Put the next picture in, which would be Plaintiff's Exhibit Number 7, mid-back. Will you find your same ninth thoracic vertebra?

A. There it is.

Q. Does it appear in better shape or worse shape?

A. About the same.

Q. Is there any additional remark you desire to make comparing to the former picture?

A. No, what I said about the first picture in this area holds true for that.

Q. The next picture, please?

A. That is a picture of that low back, the fifth lumbar and the sacrum, shows a good deal of narrowing, the over-[fol. 102] riding facets and some diminution of size of the foramen, with a little lipping still present. It hasn't changed much, or none I would say, approximately the same.

Q. Now, all right, remove the picture please and take your last set of pictures.

(Plaintiff's Exhibits Numbers P-9, P-10, P-11, P-12, X-rays, marked for identification and offered in evidence.)

Q. Place first the neck picture in the box.

A. This was taken on the 19th of November 1954. We have the same things present.

Q. Any additional changes?

A. There now appears to be more roughening of the antero-inferior margin of P-6. Right here there is more roughening, a little bit more piling up of new bone or calcification or mineralization.

Q. What does that mean?

A. It means that the healing process is still going on, or has been re-injured from June to November, and nature is building up new healing, new bone formation.

Q. Anything else you desire to say in regard to that picture?

A. No, sir.

Q. The next one is the mid-back, and you find your same ninth dorsal or thoracic?

A. Right there, definitely wedged or compressed as com-
[fol. 103] pared to its neighbors.

Q. No further statement in regard to the picture?

A. Very similar.

Q. The last picture——

A. That is the low back again and shows the same narrow disc posteriorly, overriding facets, with some narrowing of the foramen. I have two pictures on this here. One was taken on the right side, and one was taken on the left side. It doesn't make any difference but I thought I would just go ahead——

Q. Go ahead and put it in.

A. I am now talking about P-12. He was laying on his right side. It shows the same thing, whether you turn him over on one side or the other, it doesn't make any difference. In other words, this is a condition that is there regardless of how you move him around.

Q. Have the witness stand, please.

The Court: Have a seat.

(Witness taking witness stand.)

Q. Now as was mentioned by—a little while ago, that you, being in diagnostic work, I asked you to check physically each area where you made a reading from the X-rays, and have you done so?

A. I did.

Q. This last time only?

[fol. 104] A. I did.

Q. Now, checking the area of the hand, do you regard

the hand as of very much importance now, or do you think it is pretty well healed up?

A. It is healed, but there is an important point, the man has a weak grip in his right hand. An ordinary right-handed person has a better grip in his right hand than his left-hand and my examination discloses that his right-hand grip is weaker.

Q. The neck, having in mind the area where the neck is injured, as shown by your X-rays and as testified by you. Does it also produce physical symptoms which you could detect as a doctor, independent of what he may tell you?

A. Yes.

Q. What are those?

A. That was indicated by his muscular spasm or muscle tightness during examination. An individual can't produce of his own volition muscle spasm, and then he has restricted movements of his head and neck. He has tenderness over the spinous processes of the lower two cervical vertebrae.

Q. Now you used the term spinous processes, I will ask you whether or not that is a bone, something a little bit curved on the back part of the body of the vertebrae like you would see down a hog's back, you know, when you butcher him?

A. Yes, sir.

[fol. 105] Q. Do you believe that that neck condition hurts him?

A. Oh yes, I do.

Q. Now going down to that ninth thoracic vertebra, the one that is mashed together in the front border?

A. Yes,

Q. What are the physical findings with respect to that, right where the X-ray shows?

A. Pressure causing pain over this area. His back muscles are held taut or rigid. I had him go through some calisthenic like procedures to see what I would make of his reported inability to work with his hands high or above his shoulder level and he does this with restricted movements, hesitation, and at the same time his back muscles show this attempt to keep from moving them.

Q. The lower back, will you——

A. Now the lower back also shows similar findings. His bending, his twisting, stooping are all restricted. He does

it with hesitation. He can't get down low enough as the average 52 year old can. When he tries to do this you can see the back muscles, the spinal muscles tighten up. When you lay him down on his back and tilt his legs up stiff like, he will automatically arch his back to—on account of the pain it produces.

Q. Doctor, did you carefully measure each of his legs?

A. I did. I measured his legs, right and left, both standing and lying down, and I thought they were absolutely [fol. 106] equal lengths.

Q. Doctor, it has been brought out in evidence generally here that this man has been doing some amount of work. That he has been doing the best he could, by favoring himself he has been getting along, getting some work done. Do you believe that this man is capable or should perform manual labor involving lifting, stooping, shovelling and climbing?

A. I don't believe this man should be subjected to this kind of work. He has three important disabilities. His neck, his thoracic spine and low-back spine. Certainly the thoracic and the lumbar disabilities are enough to—separately, would be enough to warrant not subjecting him to manual—hard manual labor.

Q. He complains of being unable to climb a ladder straight up like the side of a box car. How do you explain that? Do you think that is a proper complaint?

A. Yes, that just happens to be one. I think there are many things this man can't do profitably to himself. In other words, it comes back to all of this muscle spasm. His back is held as rigid as nature can get it to keep it from hurting him, and when he climbs a ladder he is using muscles in his arms, his back and his legs and I can see where that makes climbing very difficult.

Q. Being a man 52 years of age, do you expect him to grow any better in the future, hold his own, or with age grow worse?

[fol. 107] A. Well, the natural progress of these things is usually to get worse. They deteriorate more.

Q. Having mentioned the presence of some arthritis, that is an inflammation of bone joint, isn't it?

A. Well it is hard to say that it is an inflammation, but we do know that it is a bone disturbance.

Q. Is there any cure for that?

A. No.

Q. Is it the tendency of arthritis to remain stationery or to get better or to get worse as time goes on?

A. I think the natural tendency is for it to get worse as a man gets older or a woman gets older.

Q. If it is present in his spine, may it spread over the entire spinal column?

A. Oh—yes, it can.

Q. Suppose you would have a man, just for the purpose of your answer to this question, just assume all of the following named facts to be true, in that respect you don't have to question, just suppose that they are true. I will ask you to suppose a man weighing 185 pounds, roughly six feet tall, is walking down on a hard surface like packed gravel, and there comes up behind him a truck going about 15 miles an hour, and the end gate of that truck hits this man between the shoulder blades approximately, and another portion of the truck hits him in the lower back area, with sufficient force to knock him about 12 feet, landing [fol. 108] on the right elbow and forward part of his body, and that he at once moves quickly to escape being run over by the truck and his right hand and wrist is caught under the dual tire, left tire of that loaded truck, which runs over it and he is hurled with sufficient force, either by the impact or the skidding to knock both knees out of the cordurory breeches he is wearing, with that much force, I will ask you whether such an occurrence could reasonably and probably account for the condition you found Mr. Arnold to be in on the date of each examination of him both physically and X-rays, and that occurrence happened on January 16, 1952?

A. It well could.

Q. It well could?

A. Yes, sir.

Mr. Gallagher: That will be all.

Cross-examination.

By Mr. Cobb:

Q. Doctor, there are several types of arthritis are there not?

A. Yes, sir.

Q. And arthritis is very common in men and women after they reach their fortieth birthday, regardless of whether they have been injured or not?

A. That is true.

Q. That is true. And as a general rule the older you get the more arthritic pain you feel, whether you have had [fol. 109] injury or not, that is true, isn't it?

A. Yes, it is possible.

Q. Doctor, I wonder if you will step down here and place your P-1 in the view box. (Witness standing in front of view box.)

I believe you said that there was evidence there of a break in a finger?

A. Yes, right there, a piece of bone is broken off right there. (Indicating.)

Q. Now, can you tell this Jury how long that break has been in existence by looking at that X-ray picture?

A. No.

Q. You couldn't say whether that had been there two weeks or had been there two years, could you?

A. No, you couldn't be absolutely sure.

Q. And if Mr. Arnold had an injury to that finger, say sometime at another time when he was working for the railroad company and where he did have a finger hurt or broken, that could very easily be that, couldn't it?

A. It could be, yes.

Q. Now, doctor do you see any evidence of arthritis in that picture?

A. I don't see any arthritis in that picture.

Q. What is this right here, doctor?

A. Well I believe that irregularity is due to injuries, a building up of new bone, irritation of the periosteum, the [fol. 110] lining of the bone.

Q. It is your testimony there that that would not be arthritis?

A. That's not arthritis.
Q. In your opinion?
A. In my opinion.
Q. Now, what is this here, doctor?
A. That is the styloid process of the ulna. That is supposed to be there.
Q. That is normal?
A. Yes, sir.

(Court recessed until 1:30 P. M. November 23rd, 1954.)

JURY OUT

JURY IN

1:30 P. M. November 23rd, 1954

DR. S. H. KAHN (continued) having been heretofore duly sworn testified on further cross-examination by Mr. Cobb, as follows:

Q. Do you mind coming here, doctor?

(Witness standing in front of View Box.)

I hand you Plaintiff's Exhibit Number 3. Now doctor, this morning I believe you testified concerning a chip at this point?
A. Yes, sir.
[fol. 111] Q. That's on cervical——
A. Six.
Q. —six, is that right?
A. Yes, sir.
Q. Now doctor, could you tell by looking at that X-ray film how long that condition has existed there?
A. No.
Q. It might have been there two weeks or several years?
A. You can't tell.
Q. Just can't tell?
A. No, sir.
Q. Now doctor, could you say whether or not that little prolongation you see there would be arthritis?

A. That isn't arthritis.

Q. Why, in your opinion, doctor, is that not arthritis?

A. Because arthritis starts at the cartilaginous margin of the bone.

Q. If you will, just tell the Jury what you mean by cartilaginous?

A. The margin of the bone here, and this is separated from it.

Q. Now that is on the other side of the picture isn't it, doctor? That little tip there, isn't that on the other side of the bone? It is not on this side is it?

A. You can't tell which side that's on.

Q. Did you take a picture of the neck from the other side?

[fol. 112] A. No, sir.

Q. This was taken from which side?

A. That is taken from, through his right side.

Q. Through his right side?

A. Yes, sir.

Q. And you have none through the left side?

A. No.

Q. And you can't tell whether or not from this picture, that little tip there joins right on to this little cartilaginous structure?

A. Yes, I say it does not.

Q. You say it does not?

A. That's right.

Q. And you say so from this picture, tell the Jury why.

A. Because it is entirely distinct and separated from the bone above and the bone below.

Q. It does join something doesn't it, doctor?

A. This fragment lies in the soft tissue.

Q. You mean that fragment is loose in there?

A. Yes.

Q. And is not connected to any——

A. Not connected.

Q. That's your testimony?

A. Yes, sir.

Q. Now all three of the pictures that you took of the neck

[fol. 113] show that same condition, do they not?

A. Yes, with the exception of one that showed it being enlarged some.

Q. Enlarged some?

A. Yes, getting bigger.

Q. All right, would you show that picture to the Jury? Is that the one that shows it larger?

A. It shows it.

Q. How do you account for that getting larger, doctor, if it is not connected with anything?

A. I said it was lying in the loose ligaments, and spaces in between ligaments and between muscles. It is not attached as a part of any particular structure. It amounts to a foreign body which has no business there.

Q. How do you account for its growing, doctor?

A. Nature is trying to immobilize that. It caused an irritation where it was lying in the tissue around it and nature is walling that off by building up around it to immobilize it.

Q. It is your testimony then, that because it is larger there, that that is an inflammation around it?

A. It is producing, you could speak of it as inflammation. In a way, it is irritation instead of inflammation.

Q. And that causes this to gradually get bigger?

A. Yes, nature will wall that off and by doing it it is over producing, it over walls it and I think that is the reason why you see this enlarging and it is throwing out [fol. 114] spicules right there.

Q. Now this little substance that you see, this small substance is this growing, itself?

A. I believe, compared to the first picture it is a little larger.

Q. Than it was the first time?

A. Yes.

Q. Doctor, if you had that P-4 here—I believe that is the one, P-4, will you insert that in the View Box? (Witness putting X-ray in View Box.) Now, what portion of Mr. Arnold's anatomy is that?

A. That is the part of his back-bone that extends from about his neck down to his diaphram, to the end of the last rib, say, just above the waist line.

Q. I believe this morning when you were testifying that

you said there was something wrong with the ninth thoracic vertebra?

A. Yes, sir, that is right.

Q. Would you point out to the Jury the defects that you see in that vertebra?

A. This vertebra is narrowed in the vertical diameter. You could measure it. It measures—see right there—definitely narrowed.

Q. Now doctor, in a normal individual, are those vertebrae always the same size?

[fol. 115] A. No, they get smaller from here up, and larger from here down, but they have a uniformity or enlarging or diminishing as you get up higher or go lower.

Q. You are saying, in other words, that there is too much of a jump here?

A. Yes.

Q. Between this size and the size next to it?

A. Yes, sir.

Q. Now, did you find anything else wrong with that?

A. I think I pointed out that there is evidence of a little hypertrophic arthritis at this point here, a little spurring here and here, several of these have that—for instance, little spurs, like a rooster's spurs.

Q. How long does it take doctor, for that little spur to form in a normal man's body?

A. Well, there is no set rule on that. It can happen say after about—oh, calcium will start depositing in say three weeks but you can't tell when it's started.

Q. But you say that spur there could have been built up over a space of three weeks, is that right?

A. Yes, it could.

Q. And you believe it was?

A. I don't say it was.

Q. Do you think it was?

A. I just don't know.

[fol. 116] Q. You don't know how long this condition has existed there, you can't tell by that X-ray, can you doctor?

A. I don't know how long this has existed, the hypertrophic arthritis which is minimal, it isn't much.

Q. Well do you know how long this compression fracture that you pointed out here has been there?

A. No.

Q. That might have been two weeks or might have been two years or even longer than that?

A. That can happen in an hours time. It could be a sudden compression of the vertebra and could build up immediately.

Q. Now doctor, is there any evidence of healing there on that compression fracture that you pointed out to the Jury?

A. Yes, I presume, or I believe that there is already some spurring here and here at both anterior margins of that ninth thoracic vertebra. Now I don't know whether that is actually healing or whether it was already there and is more permanent now because the body was mashed down.

Q. Now doctor, when was this film taken?

A. That was taken February 2nd, 1952.

Q. 1952?

A. 1952.

Q. All right, sir. Would you just take the stand, doctor. (Witness taking witness stand.) When you examined Mr. Arnold you took a case history from him did you not?

[fol. 117] A. Yes, sir.

Q. Did he tell you in that case history when he was injured?

A. He was injured January 16, 1952.

Q. That was some—little over two weeks——

A. The 16th——

Q. —before you examined him?

A. A little over two weeks.

Q. At the time you examined him, did he give you any history of any prior injuries he had received?

A. He had his right leg hurt once.

Q. Was it hurt or broken?

A. Broken.

Q. Did he tell you how that occurred?

A. I didn't ask him. I don't remember.

Q. It is possible for individuals to have fractures and arthritis in their vertebral areas without knowing anything about it for sometime, isn't it doctor?

A. Fractures?

Q. Yes.

A. I don't think so.

Q. It is possible for an arthritic condition to exist there without him knowing about it?

A. Oh, yes, you can have arthritis, hypertrophic arthritis, without an individual knowing about it.

Q. What type of arthritis do you believe that Mr. Arnold has?

[fol. 118] A. This is what we speak of as hypertrophic arthritis, chronic hypertrophic arthritis.

Q. It is your testimony then that it is possible for him to have had that before this injury and not know anything about it?

A. Oh, yes.

Q. Now doctor, you have testified in this court before, haven't you? This same court, haven't you?

A. I don't know. I want to say no, but I am not absolutely sure. If it has been it was maybe once before.

Q. You testified here back in December, didn't you, of this year?

A. No, sir.

Q. In the George Butler case?

A. George Butler, yes, that's the one.

Q. And the same attorneys here were attorneys for George Butler against the Railroad Company then, weren't they?

A. Yes, Mr. Bean.

Q. And, he was out here and you testified in that case?

A. Oh yes, sure did.

Q. At that time you testified that you were a specialist in internal medicine, did you not doctor?

A. Yes.

Q. And that is still your specialty?

A. Yes, sir. It sure is.

Q. You are not posing here as an expert on X-rays are [fol. 119] you, as a radiologist?

A. I am not posing as a strict radiologist, no.

Q. Now doctor, you have testified a good number of times for these same attorneys here who are representing Mr. Arnold in this case, haven't you?

A. No, as a matter of fact it is rare that I testify. It just happens you asked that question. The only two times I have been in the Lubbock County Court House I suppose you were in on both cases, the two of them.

Q. That's right, doctor.

A. That is the only time I have been out here.

Q. But you have testified for them in the Dallas Courts, haven't you?

A. Rarely.

Q. Would you say that was in the last two years, or was that several years back?

A. Rarely, I will say for 15 years.

Q. Back behind that, did you testify considerably for these particular lawyers?

A. I don't believe I—I doubt if I did any work for them prior to that time.

Q. But you do some work for them now, is that correct?

A. Yes, if they have a case they want me to examine and you know, see, and X-ray.

Q. And testify in?

[fol. 120] A. I do that.

Q. What are you charging for testifying in this case, doctor?

A. I hadn't even thought about it.

Q. You have no idea?

A. No. I will think it over on the way back.

Q. How did you get out here, doctor?

A. Flew out here.

Q. And you will fly back?

A. Yes, sir, I will fly back.

Q. Your fee for coming out here and spending a day and going back by plane won't be less than $250.00 will it, doctor?

A. Oh, I think it will be.

Q. You don't know though?

A. I don't know.

Q. You reserve the right to bill them later, is that right?

A. I reserve the right to figure out what I want to charge them.

Q. Later on?

A. But it won't be exhorbitant.

Mr. Cobb: That is all.

Mr. Smith: I believe I have no questions.

Mr. Gallagher: Thank you very much.

The Court: You may step aside.

[fol. 121] Dr. Ben L. Schoolfield, having been first duly sworn testified on direct examination by Mr. Gallagher as follows:

Q. Your name is Dr. Schoolfield, isn't it?
A. Yes, sir.
Q. Your full name is Dr. Ben L. Schoolfield?
A. Yes, sir.
Q. You live in Dallas?
A. Yes, sir.
Q. And you conduct your practice in Dallas?
A. Yes, sir.
Q. And how long have you been practicing your profession?
A. Since 1911.
Q. How old a man are you?
A. Sixty-six.
Q. What medical school did you graduate from?
A. University of Tennessee.
Q. Following the date of your graduation, did you, or during your school time, school days, do any teaching in medical schools?
A. Yes, sir. I taught at the University of Tennessee at Memphis. I taught anatomy mostly.
Q. What is anatomy?
A. It is the description of the parts of the human body.
Q. Muscles, bones, nerves and so on?
[fol. 122] A. Yes, sir, blood vessels——
Q. Distribution, what they are called, what they do?
A. That is right, not so much their function in anatomy, that is a matter of physiology.
Q. Have you followed your profession continuously, since the date of your graduation?
A. Yes, sir.
Q. I will ask you whether or not in 1917 you were then a practicing physician?
A. Yes, sir.
Q. Did you at that time enter upon any field of specialty with respect to your profession?
A. Yes, in the latter part of 1917 I began specializing in orthopedic surgery.
Q. That is bone and joint work, isn't it?

A. Yes, sir.

Q. With particular emphasis on bone and joint troubles?

A. Injuries and diseases.

Q. Doctor did you—where did you take your special course for that work? Did you have an army course?

A. Well the Army sent us to Oklahoma City, where we had work under Dr. Robert Hull and his associates for six weeks, I believe and then after the war was over I was in France and I then had an opportunity of doing some further post-graduate work at the University of Lyons, [fol. 123] France. I was there for three and a half months.

Q. Any further post-graduate work in bone work?

A. Back in New York I was on the house staff of a hospital for ruptured and crippled, where I wound up as House Surgeon early in 1921.

Q. Since—did you have occasion—were you a bone specialist in the Army in 1917 and '18?

A. Well, I was more or less a beginner in those days, but I was assigned to that service anyway.

Q. You did that work?

A. Yes, sir, more or less.

Q. Have you followed your specialty, roughly, since the war of 1917?

A. Yes, sir.

Q. Have you had experience in the matter of the reading of X-ray pictures, with particular reference to bones?

A. In reference to bones and joints, yes.

Q. Do you feel from your experience, roughly of some forty years or more, that you are qualified to look at an X-ray picture showing a bone, and saying with a reasonable degree of accuracy what it shows, normal or otherwise?

A. I believe so.

Q. Do you do, in addition to examining to determine what is wrong with a man, do you actually do surgery on the bones and joints?

[fol. 124] A. Yes, sir.

Q. Do you do any child surgery for crippled children?

A. Yes, sir.

Q. In Dallas?

A. Yes, sir, I have done a good deal since I have been there.

Q. Do you do any charity child surgery in Dallas?

A. Yes, I used to do a good deal of that and I still do some occasionally.

Q. Now this is Mr. Arnold back here, you have met him, haven't you?

A. Yes, sir.

Q. We, as his attorneys sent him to you for an examination, that is correct isn't it?

A. Yes, sir.

Q. To report back to us what you found?

A. Yes, sir.

Q. We did not send him to you for the purpose of treatment, did we?

A. No, sir.

Q. Did you have a history as a part of it that he was already receiving treatment from the railroad hospital?

A. I understood that he was.

Q. Now, doctor, he came to you I believe—was it about —what time?

A. The second of February 1952.

[fol. 125] Q. Did you at that time make a physical examination of him?

A. Yes, sir.

Q. Just describe as briefly as you may, in the interest of time, what that examination consisted of?

A. Well we had him take off most of his clothing and examined the parts of his body of which he was complaining at the time. We examined the back of his neck, and shoulders, the right upper extremity of the spine and the lower part of his back mainly.

Q. What did that examination disclose physically?

A. Well we found that he was tender over his back of his neck, over the cervical spine and over his upper dorsal spine and his lower back. There was some tenderness over the head of his right radius and tenderness over the bases of the first and second metacarpal bone on the right side.

Q. Right-hand?

A. Yes, sir.

Q. What did you find out in regard to his ability to have the normal use of his lower back?

A. Well, we found at that time that backward bending was complained of. In his neck, we found limitation of movement in his neck, in everything except forward bend-

ing and he complained of any movements of his neck and in his lower back any movements.

Q. Doctor, physically, so far as the physical examination [fol. 126] disclosed, how many examinations did you make in all?

A. I examined him on February 2nd, again on April 16th of this year, and again on the 12th of June of this year, and more recently on the 19th of this month, that's four times to be exact.

Q. Did you have, or cause to be made, or have Dr. Kahn make X-ray pictures of him?

A. Yes, sir, I took him up to Dr. Kahn and had him make X-rays.

Q. Were you present when those pictures were made?

A. Yes, sir, on three occasions I believe, he made X-rays.

Q. Were you present each time X-rays were made?

A. Yes, sir.

Q. Were you present when they were developed, put in the bath and out?

A. I stayed there until I could see them.

Q. Step down here, please. (Witness standing in front of View Box.)

We have here three pictures, marked Plaintiff's Exhibits 3, 6, and 9. As already identified they represent neck pictures of Mr. Arnold, taken on February 2, 1952, June 12, 1954, and November 19th, will you put those all three in the View Box at the same time, if you can. Are you able to do that? If you can't put the first two in then and then the third one.

[fol. 127] A. Here is the last one made. I think we had better put in the two possibly. This one is the first one, here is the second one. (Putting two pictures in view box.)

Q. Give your reading on the pictures.

A. This is a lateral view of the cervical spine. That is the spine in his neck and it shows the bone here and the back of his head here. He has some lipping here on the vertebrae about the fourth, along the lower margins of these intervertebral bodies and this vertebra here, which is five, is somewhat wedge shaped, I believe. This is the one I was talking about—sixth, is wedge shaped and has a little fragment of bone loose here in front and below and this

one shows essentially the same things, it is perhaps a little more developed along the 4th, 5th, 6th, etc., lipping.

Q. Will you take a pencil there and just mark that vertebra which you state—have testified rather is damaged?

A. Well, there is several of them there but more particularly right at this point.

Q. Will you put an "X" on this one here?

A. An "X" on this one?

Q. Yes, sir.

A. All right, sir. (Witness writing on X-ray.)

Q. Now, will you put the next picture in of the same area?

A. This is the last one made a few days ago, showing the same vertebral bodies here, crushed down on the border, and showing lipping on the lower margin of this and this [fol. 128] and this, a little bit, a little loose piece of bone here.

Q. Is there any improvement from the first picture back to the third picture of November 19, 1954?

A. I don't see any, if anything it is a little worse.

Q. Now, take the next pictures of the dorsal area, you can't get all of them in so put one of them——

A. This is the one that was made first.

Q. —the first picture in.

A. All right. This is somewhat of an oblique view of the dorsal spine, the part of the spine back of the chest. It shows a little lipping along the anterior margin of the vertebral bodies. See the ribs here coming around and this vertebral body here is very much narrowed in front and behind, what we call wedge shape. There is evidence of damage, considerable damage to the body of that vertebra.

Q. Will you take the next picture of the same area, which would be June 12, 1954?

A. It shows much the same situation, with damage here to this vertebral body and some to the ones above it there.

Q. The next picture, same area?

A. Here you have this same damaged vertebral body here, with a little lipping along the front.

Q. What is that lipping?

A. Lipping? It is a bone which—an abnormal amount [fol. 129] of bone on the forward edges of that bone.

Q. Is it disease or injury?

A. Well, I think it is likely injury in this case.

Q. That is the last one of the mid part of his back?

A. Yes, sir.

Q. Is there any improvement from the first to the last, February 2nd, 1952?

A. No, I don't see any improvement.

Q. Take the lower back?

A. This one is made on the second of February.

Q. Take the next one in there, made on June 12. It will take two of the smaller ones.

A. All right. There you are. This shows a little lipping here on the third lumbar vertebra and a little on the bottom of the fifth. This intervertebral space here is reduced at the back. It is narrowed, and the foramina here are narrow as compared to the ones up here and here. There is overriding of the articular facets.

Q. What is your reading on the second picture of the same area?

A. Well, it is practically—very much the same. Practically the same as that.

Q. There is the third picture.

A. Yes, sir.

Q. Anything different there?

A. No, it is practically the same. Just narrowing at the [fol. 130] back of the foramina, and overriding facets.

Q. Take that pencil doctor, and show me, mark on that fifth lumbar vertebra where or how much space there ought to be between the fifth and the sacrum to be normal?

A. Well, approximately the same as there is here for example. Here is your interspace here and here, this ought to be almost as narrow behind as those. Here you can see the foramina is reduced in the thickness of the discs between.

Q. When you lessen the space, as you testified, in the foramen back of the fifth, what effect does that have on a person's feelings or sensations?

A. It is apt to encroach on the nerve roots which come out through those foramina, the holes here are called foramina, one on each side, the right and left, and a narrowing of that space crowds things in there and causes

pain, and frequently referred pain down one or both of the lower extremities.

Q. Is there—with a body of a vertebra down considerably on the back more than the front, would that have any effect on the normal use of a person's back in bending forward or lifting?

A. Well, that usually li its movement forward and backward both and, of course, when that vertebra—that disc is damaged it will cause pain upon either movement or lifting weights of any size at all.

Q. Is there anything—any way to operate on the mid part of his back to give him any relief on that ninth tho-
[fol. 131] racic vertebra that you have pointed out?

A. Well, the spine could be fused at that area, that is upon grafting up and down along the left part of the spine, of course right now, if you had seen it in the very beginning, it might possibly have been amenable to some correction, by putting the patient into hyperextension of the spine, pushing it way back on his spine this way, to bring that front part of the vertebra back into line. It is more difficult to do in a chest area, because you have the restriction of the ribs on the side.

Q. Do you think that would help him now?

A. It wouldn't do anything for him now.

Q. Do you know of anything that would help him now?

A. Not outside of a surgical operation, a fusion.

Q. You speak of bone graft, where are you going to get the bone?

A. Well you can get it right off of the back of his spine, or you can take it off of the hip bone.

Q. Dig from one place and put on another?

A. Yes, sir.

Q. Now, on the lower back trouble, that fifth lumbar vertebra where it appears to be down in the back and flared open in the front, can you do anything for that now?

A. It's the same sort of thing. It might be necessary to remove a disc at that level from the inside of the spinal canal, and then after that do a bone grafting operation on the lower part of his back.

[fol. 132] Q. In the absence of medical help, I say without medical help does he have any chance to get better?

A. I don't think so.

Q. Doctor, oh yes, the hand, you have before now taken a look at the hand pictures, haven't you?

A. Yes, sir. I saw everyone of them right after they were developed.

Q. There is only—is that right, or wrong?

A. It is the right hand, he had, I believe, we found a small fracture right here on this first joint in the middle finger and there was some small piece of bone here which was out of place right along there, back of his thumb at this point. He was complaining of that and complaining of tenderness when I first examined him.

Q. Doctor, is there anything in the elbow that you thought was worthy of note?

A. No, we didn't—there is a little roughness back of this, but we didn't think anything very definite.

Q. Doctor, this man complains of inability to use his arms and work with his hands above his head, are you able to see anything in any X-ray picture which, in your judgment, might explain that complaint?

A. Well, the damage to this dorsal vertebra, ninth I believe, would explain that, I believe, and perhaps to a certain extent maybe those of the neck. But of course they haven't much to do with this, but at the same time it would [fol. 133] certainly prevent him from lifting anything upward very much without a lot of pain to say the least.

Q. Doctor, you used the word dorsal vertebra, is that the same thing as thoracic vertebra we have been talking about?

A. Yes, sir, they are inter-changeable as to the spine. The two words for the same thing, that part of the spine in back of the chest.

Q. This man complains at times of a numbness in the right hand, do you see anything in the neck where you might explain that numbness?

A. Well, the changes that are found in the vertebrae there might explain it on the basis of some nerve pressure.

Q. What nerve?

A. The cervical nerves.

Q. Do they come out where the trouble is there in his neck?

A. Yes, sir, one on each side, the nerve roots for the right arm and the left arm.

Q. Have you observed any improvement in his condition from the date of your first examination in February of '52 to November of '54, any improvement?

A. None, except as to his arm. I mean the right arm, he doesn't seem to be complaining as much from that as before when he first came to me, but otherwise as far as his spine is concerned it has not improved.

[fol. 134] Q. This man has been doing work of some degree of lightness or heaviness, whatever you want to call it, off and on since he got hurt, do you believe that this man in his condition, as disclosed by your examinations and X-rays, should do work like lifting, climbing, and things like that, heavy work.

A. I don't think he should. I doubt if he could do it and keep it up for any length of time, without having to quit or lose his position, his job.

Q. Do you believe that atempted work with his neck, hand, back, mid-back and low-back, do you believe that attempted work could reasonably be expected to be accompanied by pain?

A. I think so.

Q. Doctor, if you would assume that a man about six feet tall and weighing about 185 pounds was walking along a hard-packed surface and there came up without any notice from the rear behind him, a truck, a heavy truck, loaded, and its end-gate hit him roughly between the shoulders, the shoulder level and the back and a portion of the truck hit him in the small of the back and with sufficient force, the truck travelling roughly fifteen miles an hour, and knocked him about twelve feet through the air, he landed on his right forearm and forward part of his body that with sufficient force, either by the blow or otherwise, that both knees of his corduroy trousers were busted open, and that upon landing he immediately exerted instant movement to get out of the path of the truck and the truck [fol. 135] —and cleared it with the wheel grazing the side of his face and his hand and wrist—his hand was run over by the wheel of the truck. That happened on about the sixteenth day of January, 1952, and observing the condi-

tions as testified by you, do you think that may be reasonably accounted for by such an occurrence?

A. I should think so.

Mr. Gallagher: That is all.

Cross-examination.

By Mr. Smith:

Q. Dr. Schoolfield, you live in Dallas, I believe you said?

A. Yes, sir.

Q. You don't treat patients out at Lubbock, do you?

A. Sir?

Q. You don't have any patients out here in Lubbock, do you?

A. I have them come to me occasionally.

Q. How is that?

A. I have them come to me from anywhere they want to come from, if they want to come to Dallas it's all right I will see them in Dallas.

Q. You do your practicing when you are treating people down in Dallas, is that correct?

A. Yes, sir.

Q. You did not treat Mr. H. T. Arnold at any time as I [fol. 136] understand?

A. No, sir.

Q. As far as you know did Dr. Kahn ever give Mr. Arnold any treatment?

A. No.

Q. But you examined him on—the first time on February 2nd, 1952, in Dallas, is that correct, sir?

A. Yes, sir.

Q. You and Dr. Kahn did that together?

A. No, I examined him and then took him up to Dr. Kahn's office on another floor of the building and had X-rays made.

Q. And you waited there for the X-rays to be made and developed?

A. Yes, sir.

Q. Then you and Dr. Kahn went over those X-rays together, I presume?

A. Yes, sir.

Q. And I believe you testified here Dr. Schoolfield, that the condition you found the last time you X-rayed Mr. Arnold and examined him was not substantially different to what you found the first time?

A. Not a great deal.

Q. The X-rays showed about the same thing?

A. Pretty much.

Q. Whatever hypertrophic arthritis he had was about the same on February 2nd as November of this year?

[fol. 137] A. If he had any hypertrophic arthritis.

Q. Well now would you tell us what you mean when you said he had lipping on the vertebrae in the cervical area and thoracic area and also the lumbar?

A. Well that could possibly be due to injury rather than hypertrophic arthritis.

Q. Does it look any different, to hypertrophic arthritis?

A. Well, not very.

Q. In other words, if it was hypertrophic arthritis would it look just exactly the same as what you saw there?

A. Except hypertrophic arthritis is apt to be distributed more widely up and down the spine than a localized injury would.

Q. Now didn't you find some lipping in the cervical area?

A. In the cervical?

Q. Yes, sir.

A. A little bit, yes, sir.

Q. You found some in the dorsal and thoracic areas?

A. Some.

Q. Found some in the lumbar?

A. A little bit, yes, sir, not too much.

Q. So it was widely distributed through the spine was it not?

A. Not continuously over the whole area.

Q. Now doctor, Mr. Arnold told you that this happened on January 16th, did he not?

A. I believe that was his statement.

[fol. 138] Q. Some two weeks later you took the first X-rays?

A. Three weeks, I believe.

Q. Well, it was on the second of February, is that right?

A. Yes, about two and a half weeks, two weeks and three days to be exact.

Q. All right. Now, the lipping that you found there, that is bone, isn't it? That that you described as lipping, is that bone?

A. Yes.

Q. And is it your thought that that bone formed all through that back during that perior of two weeks and three days?

A. Well, lipping that is a result of injury is not formed, it is crushed down to that point, or damaged, or pushed out of place.

Q. In other words, in all of the area where you found lipping, your opinion is that there was a crushing on each one of those vertebrae, causing that lipping?

A. Could have been.

Q. Is that your opinion?

A. Well, certainly part of it is due to that, I think.

Q. Don't you think it is much more likely that it was due to arthritis, and that it existed prior to January 16th, 1952?

A. It could have.

Q. Don't you think it is more likely?

A. I don't know about that.

[fol. 139] Q. You are not going to say? Now you testified doctor, to the fact that Mr. Arnold had pains on various bending of various kinds, of course, you knew that because he told you that didn't he, when you made your physical examination?

A. Well I can tell when a man has limitation of movement, of course, I can not feel the pain for him but I can hear him when he complains.

Q. That's right, and you heard him complain and so you assumed that he had pain, isn't that it?

A. Well, I think I found enough there to justify me in that conclusion.

Q. Yes, sir. He complained enough that you concluded that he had it.

A. No, I found enough trouble in his back in the X-rays and physical to think he should have pain whether he has or not.

Q. That is this extensive lipping that you found in the cervical, thoracic, and lumbar area?

A. Lipping?

Q. Yes.

A. I would say more due to the damage to the bodies of these vertebrae, the sixth cervical vertebrae and the ninth dorsal and the lower part of his back, the lumbo sacral joint. I think those are the main sources of his pain.

A. All right, sir, now doctor, you referred to cervical vertebra, the sixth cervical vertebra, you said, is that correct?

[fol. 140] A. I believe it was the sixth, either the sixth or the fifth, it doesn't matter much which one they are so close together.

Q. Could you tell by looking at the X-ray that you took February the second how long that condition had existed in Mr. Arnold's neck?

A. No, you can't tell altogether.

Q. If a bone is injured it just naturally starts a formation of new bone, does it not?

A. Well, when a bone is crushed into a wedge shaped mass it remains that way or it may be corrected by manipulation, if someone reaches him in time to do that for him and knows how to do it.

Q. And you couldn't tell, really had no opinion on February 2nd, as you looked at that sixth cervical vertebra, whether that happened on January 16th or two or three years before?

A. Well, I thought more than likely it happened recently.

Q. Well, you thought that because of what Mr. Arnold told you?

A. Well——

Q. Did you have any other reason for thinking it?

A. Mainly from the fact that he said that he has not had trouble there before, that was one of the reasons, certainly.

Q. He told you, did he not, that he was in an automobile wreck in which he broke his right leg, back in 1926?

A. I don't recall his telling me that.

Q. He didn't tell you that? You never did know that during the time that you were making your examinations, [fol. 141] did you?

A. If he did, I didn't write it down, because it didn't have anything to do with this.

Q. Did you know whether or not one leg was shorter than the other?

A. I did. On the last time he came I found no shortening at all.

Q. You found no shortening?

A. They are both of equal length as far as my tape could tell me.

Q. You didn't ask him if he had had prior injury before January 16th, 1952, at no time did you ask him that question?

A. I can't remember now all of the questions I asked, that is too long ago.

Q. In other words, you don't remember ever asking him about prior injury, is that right?

A. Well, I frequently do ask questions of people if they have injuries and I imagine I did him too, although I have no independent recollection of any special time I did.

Q. All right. You won't say you asked about it. Now then doctor, you said down in the dorsal area the ninth vertebra was wedge shaped and damaged, could you tell by looking at that when he got that condition?

A. No.

Q. It could have been several years, couldn't it?

A. It could have been before.

Q. It is not too difficult is it, doctor, to look at an X-ray [fol. 142] of a bone injury and tell whether it happened that day or the day before or several years before, is it?

A. Well, if it was just the day before it might not be so difficult to tell it, but if it happens to be two or three weeks it might be more difficult then to tell.

Q. But an X-ray picture taken the day of the injury or a day or two later, you could tell by looking at that whether it was recent or many years before?

A. You frequently can, if they are properly made.

Q. How can you tell?

A. Just because you know how to do it.

Q. Now, can you tell the Jury how you determine——

A. Just like I know you when I see you.

Q. What do you look for then?

A. Evidence of a recent injury.

Q. What do you look for on the X-ray film to determine it, doctor?

A. I don't know whether I could explain that to you, if I could see one I could show it to you.

Q. If you could see one that was recent you mean?

A. That is what I mean.

Q. You found some damage to several vertebrae in the neck and several vertebrae in the dorsal area? Is that right?

A. Mostly one vertebra in the neck and one in the dorsal area.

Q. In the lumbar you found some damage to several [fol. 143] of those vertebrae?

A. Well, not so much to the vertebrae as to the disc between the fifth lumbar vertebra and the sacrum.

Q. Doctor, if you don't mind step down and let's put the picture in there that shows the space between the fifth lumbar and the sacrum, please sir, if you can find it?

A. What date?

Q. The first one, or any of the others, you say they are all the same practically?

A. Practically. Here is one here made—this is the first one, right here.

Q. Now, doctor, you don't mean to tell this Jury that there is anything abnormal about the fact that there is a tilt to the sacrum here as it is lined up with the vertebral column here, do you?

A. I never did mention there was any tilt there.

Q. Ordinarily is there not—this space is not the same width in the back as in the front, is it?

A. It is not. It is wider in the front than the back, but not that much difference.

Q. Your feeling is that there is more difference there than there should be?

A. It isn't a matter of feeling, it is a matter of knowledge.

Q. All right, sir, and you say that is not within normal limit?

A. That is narrower than it should be.

[fol. 144] Q. Is that within normal limits or not?

A. It is narrower than it ought to be, especially compared to this wide space here and these two here.

Q. It would naturally be more narrow would it not than this space here normally?

A. Perhaps a little at the back.

Q. All right, it gets more narrow as it goes down doesn't it, these spaces?

A. No, I couldn't say that. This is wider than this. There, this one is a little narrower at the back, on account of this peculiar conformation here.

Q. Now doctor you say that there is—what is wrong with that foramen?

A. It is narrow as compared to the one you see up here.

Q. You say this one should be as wide as that?

A. Practically almost as wide as this or this (indicating).

Q. But actually it shouldn't be as wide as either of those altogether?

A. Possibly not quite as wide.

Q. Now doctor, the hypothetical question which was put to you and which you answered, stating that in your opinion Mr. Arnold is not able to do heavy work, of course, you, in answering that question, you assumed the truth of all the statements that were made, did you not?

A. Assumed what?

[fol. 145] Q. Assumed that all of the statements that Mr. Gallagher made, in his questions to you, you assumed that those were all facts, didn't you, in answering the question?

A. As to whether he could work?

Q. Yes.

A. Well, I was just basing my opinion as to whether he could work on the examination and the X-ray.

Mr. Gallagher: May I—I don't wish to interrupt, but I believe the two questions are confused there. The hypothetical question, he used the word hypothetical question, that had to do with whether what happened to Mr. Arnold could reasonably produce his physical findings, not whether he could work or not. He is mixing the questions, I believe.

The Court: Reframe the question.

Mr. Smith: I will reframe the question.

Q. Doctor, in stating your answer to the hypothetical question asked you and saying that the accident, those things that were described to you, could have reasonably produced all that you found in this man's back, now you assumed did you not, you assumed the truth of all the facts which were stated to you by Counsel.

A. Naturally I have to do that with a hypothetical question.

Q. That's right, and you did, of course, didn't you?

A. Yes, sir.

Q. Now doctor, you frequently testify for these attorneys [fol. 146] here for the plaintiff, do you not, sir?

A. Every once in awhile.

Q. In Dallas and all over the State of Texas, don't you?

A. Well, I don't know that they have that wide a following, all over it.

Q. You have been to Lubbock on previous occasions, haven't you?

A. I think I have, but not for them.

Q. Some three hundred and what, fifty miles, is it to Dallas?

A. I never measured it.

Q. You don't know. Do you fly when you come out here?

A. That is the quickest way and I usually take it.

Q. And you testify for these attorneys and have for many years and in many Court Houses over the State of Texas?

A. Well, every now and then, whenever they should need me, when I examine a man I feel it my duty to appear for them if they need me, anybody that has been a patient of mine.

Q. You don't confine that to patients of yours, do you doctor?

A. Well, they are patients to that extent, that I have examined them.

Q. People you have examined so you could testify, like Mr. Arnold, is that correct?

A. I don't know that I examined him to testify. I examined him to report to the attorneys what is wrong with him, and for all I knew they might possibly settle it out of Court, which they do in most cases.

[fol. 147] Q. Dr. Schoolfield, over what period of years have you been testifying for these attorneys?

A. I don't know when they formed this particular firm. I have forgotten the date.

Q. For Mr. Gallagher here, over what period of years, fifteen or more?

A. I expect that it has been that long.

Q. What are you going to charge for giving your testimony and making this trip to Lubbock today?

A. I will charge them whatever expense I am out and at least a hundred dollars.

Q. What are you going to actually charge them, doctor?

A. I couldn't say. I haven't made up my mind about that.

Q. You don't want to say what your fee is going to be?

A. Well, I don't care to be pushed into a decision that I haven't made.

Q. What did you charge for the examinations you made?

A. Sir?

Q. What did you charge for the examinations you made?

A. I haven't made them any bill on that.

Q. Is it on a contingent fee?

A. No, sir.

Mr. Smith: Pass the witness.

Mr. Gallagher: Do we have double cross-examination?

The Court: Yes, sir, we have two defendants.

[fol. 148] Mr. Gallagher: When the issues are common?

The Court: Yes, sir, I will allow it.

Further cross-examination.

By Mr. Cobb:

Q. I believe you said, doctor, that you are a bone and joint man?

A. I do that kind of work, yes, sir.

Q. That is known among you doctors as an orthopedic?

A: Orthopedic surgeon.

Q. Orthopedic surgeon. Do you have your Board, doctor?

A. Sir?

Q. Do you have your Board?

A. What Board?

Q. You know what I mean by belonging to the Orthopedic Board. Do you belong to it?

A. I belong to the American College of Surgeons and the American Academy of Orthopedic Surgery, and the Texas Orthopedic Association, if that is what you mean.

Q. Do you have your Board, doctor? You know what I mean by being a Board man.

A. Well, I didn't pass any Board. I was already a member of these things before the Board was formed.

Q. There are several doctors here in Lubbock who do have their Board, aren't there?

Mr. Gallagher: That is an immaterial——

A. I can't——

[fol. 149] Mr. Gallagher: Just a second. I make an objection to that question. It involves a hearsay answer and is immaterial, examining one doctor on the qualifications of another, it has no bearing on any issue in this case. He is attempting to bolster his own witness.

The Court: I will sustain the objection.

Mr. Cobb: Note our exception.

Q. Now doctor, how long did you and Dr. Kahn take up in examining Mr. Arnold the first time?

A. Well, on a case of this kind it requires usually at least an hour and a half, sometimes longer. Exactly how long I spent on him in 1952, I couldn't tell you specifically. I took whatever time it took to go over him carefully and record my findings.

Q. In your opinion though, it wouldn't be over an hour and a half or two hours at the most, would it?

A. That ought to be sufficient time.

Q. You haven't submitted a bill yet for that examination made back there in 1952, is that correct?

A. No, I haven't.

Q. Now doctor, Dr. Kahn consulted with you in examining Mr. Arnold, did he not?

A. Consulted with me?

Q. Yes, you consulted together.

A. I just went up there and told him what I wanted made

on this man in the way of X-rays, and he proceeded to [fol. 150] make them in my presence.

Q. Now, if Dr. Kahn has testified from this witness stand here this afternoon that Mr. Arnold had hypertrophic arthritis, you and Dr. Kahn disagree on that?

Mr. Bean: Your Honor, the rule has been invoked, and as I understand the very purpose of invoking the rule is to prevent one witness from knowing what the other witness' testimony is and I say he is breaching that rule which his Honor has put in force.

The Court: I will sustain the objection.

Mr. Cobb: Note our exception. Pass the witness.

Redirect examination.

By Mr. Gallagher:

Q. Doctor, reference has been made to money, you know, about your being paid for your fee?

A. Yes, sir.

Q. You are entitled to your hire, aren't you?

A. I think so. The only way I have of making a living is to work.

Q. Doctor, I wish to tell you that you will be paid your full fees, if we get nothing. There is no contingency, win lose or draw. You will be paid your reasonable fee.

Mr. Smith: We object to making statements.

Mr. Gallagher: That is a question.

Mr. Smith: Is that a question?

Mr. Gallagher: That is a question.

[fol. 151] Q. You will be paid, won't you?

A. That has been your practice in the past, to pay me.

The Court: Any further questions?

Q. One question: Did you include in your examination, please sir, the reflexes of this man?

A. Yes, sir, on all occasions, in particular with reference to the lower back.

Q. Did that include the Achilles reflex?

A. Yes, sir, on all four examinations I noted that.

Q. Is that one with respect to the heel, the tendo Achilles?

A. The tendo Achilles. You tap on it, it causes the foot to—you have a man sitting on the edge of a table and you tap on it and it goes down as a result of hitting it, if it is normal.

Q. What was your finding with respect as to whether that reflex was normal with him?

A. Well, these reflexes were active on both sides, but less so on the right side.

Q. What meaning does that have, if any, with respect to the fifth lumbar vertebra being abnormally down?

A. Well, it is one of the best clinical indications that we have that there is damage to the disc between the fifth lumbar and the sacrum, or the fourth and the fifth.

Q. Does that confirm your X-ray readings?

A. It helps to.

Mr. Gallagher: That is all.

[fol. 152] The Court: You may step down. Call your next witness.

O. W. Lemon having been first duly sworn testified on direct examination by Mr. Bean as follows:

Q. Will you state your name, please?

A. O. W. Lemon.

Q. Where do you live, Mr. Lemon?

A. I live at 3311 Itasca Street, here in Lubbock.

Q. By whom are you employed?

A. By the Santa Fe Railroad.

Q. That is the Panhandle and Santa Fe?

A. Yes, sir.

Q. Employed here in Lubbock?

A. Yes, sir.

Q. How long have you been working for the Santa Fe?

A. Fifteen years.

Q. What is your present position?

A. Car inspector.

Q. Pardon me, what is your age?

A. I am 39.

Q. Are you a married man?

A. Yes, sir.

Q. Family here with you in Lubbock?

A. Yes.

[fol. 153] Q. Have you, in your experience with the Panhandle and Santa Fe Railway Company, worked around the station or depot here in Lubbock?

A. I have.

Q. Over what period of time have you worked there?

A. About eleven years.

Q. Are you familiar with what some of them call the Pullman Spur, just South of the depot here in Lubbock?

A. I am.

Q. Is that the correct designation, Pullman Spur?

A. Yes, sir.

Q. And are you familiar with the passage-way, walkway immediately West of the Pullman Spur?

A. Yes, sir.

Q. Have you worked there on cars on that Spur?

A. I have.

Q. Do you know whether or not Mr. R. A. Billings' trucks, in the past, have been up there on the premises of the railroad loading and unloading the mail from cars on that spur?

A. Yes, they have.

Q. Do you know about what period of time that has been going on?

A. Well, I really don't know. It has been going on for a good long while though. I would say two or three years anyway, maybe longer than that.

Q. All right now, we have—we have used a blackboard, will you look at this blackboard and see if that just [fol. 154] about correctly, of course it is not in proportion I am sure, assume that this square here is the station, does that approximate the position of the Pullman Spur?

A. It's a pretty good picture of it.

Q. All right, sir, and this over here is the main line?

A. Yes, sir.

Q. Running, we have been designating it North and South. How does it actually run?

A. It actually runs Northwest and Southeast.

Q. Anyway, this part, the lower end of this drawing is towards Sweetwater?

A. Yes.

Q. Now what is this area here West of these, these are supposed to be cars, what is this area here?

A. Well that is the walk-way that you referred to awhile ago where the trucks come there loading mail.

Q. Do you know about how wide that walk-way is?

A. I never measured it, but I guess it is ten or eleven feet.

Q. Have you seen Mr. Billings' trucks on that walk-way, mail trucks?

A. Yes, sir.

Q. Do those trucks, paralleling cars, the train, just about cover that entire walk-way driving up there?

A. Well there is not a whole lot of room on each side of it.

[fol. 155] Q. Do you know about when Mr. H. T. Arnold, the Plaintiff, was injured out there?

A. Yes, I remember the day, I don't guess I could give you the date, but I remember when it happened because I was working at the time.

Q. On or about January 16th, 1952?

A. Yes, sir.

Q. Fix that as to the time I am inquiring about. Now, before that date had you seen Mr. Billings' trucks use that walk-way space west of those cars shown on that drawing?

A. Yes, I have seen it used before that.

Q. How did the trucks get in on that passage way or walk-way?

A. Well, they come in from this—usually came in from this end of it, sometimes they would drive in and sometimes they would back in.

Q. And have you seen them come out?

A. Yes, I have seen them come out.

Q. How would they come out from—after they loaded the mail from the cars?

A. Well, they come out, usually come out the same way they go in, I mean from this end and come out the same way.

Q. Have you seen them go around the station before January 16th, 1952?

A. Well, it would be on very rare occasions if they did.

I have seen them on the bricks there, there in front of the [fol. 156] station and around, but that would be a very unusual occasion when they would do that. They didn't make a practice of that.

Q. Have you seen them pulling forward out of there, going forward rather than backing out, before January 16th.

A. Off of the walkway?

Q. Yes, sir.

A. Yes, I have seen them drive in and back out, and drive out.

Q. Who is in charge of the station there, the depot and the yards there, who is the boss?

A. Well, I suppose the Agent is the boss.

Q. Mr. Pumphrey?

A. Mr. Pumphrey, yes, sir.

Q. Now when Billings' truck would be unloading or loading mail, do you know whether or not railroad men, employees, helped in that operation, or any of Pumphrey's men?

A. Do you mean, do they help load and unload the trucks?

Q. No, unload the mail out of railroad cars.

A. Oh, yes, they do.

Q. Do they do that on each occasion that you have observed it when Mr. Billings' trucks and the railroad men take the mail out of the cars?

A. Yes, the railroad men take the mail out of the cars.

Q. In other words, they work with the truck driver in that respect?

A. Yes, sir.

[fol. 157] Q. Do you know about how long that had been going on before Mr. Arnold was hurt on January 16th, 1952?

A. You mean how long they had been——

Q. Working together, the railroad men and Mr. Billings' men?

A. Well, I couldn't give you a definite figure on it, but it had been going on a good while before he got hurt.

Q. All right, sir. Had there been any complaints to your knowledge made to Mr. Pumphrey, the boss, about the

trucks operating on that walk-way before Mr. Arnold was hurt?

A. I don't recall, or know of any complaint being made.

Q. You don't know about that?

A. No.

Q. All right, sir. Did you learn about Mr. Arnold's injury on the day that it occurred?

A. Yes, sir, I did.

Q. Did you take his place on that job?

A. I did.

Q. Who assigned you to take his place that day, January 16th, 1952?

A. One of the yard clerks came to where i was working, I believe it was Lester Condray, however, I wouldn't be sure about that, but anyway I was working what we call the lower yard, and he came down there and told me that Mr. Arnold had been hurt, and that the yard master had said for me to come up there and relieve him.

[fol. 158] Q. By yard master, you mean the yard master for the railroad?

A. Yes.

Q. Panhandle and Santa Fe Railway Company?

A. Yes, sir.

Q. Did you go down there and work on any cars and have anything to do with any cars on the Pullman Spur, after Mr. Arnold was hurt on January 16th, 1952?

A. Yes, I didn't do any repair work on them, I went there and inspected them mechanically, to see that the generator belts were on and that the lights were working and the doors on their rollers, etc.

Q. Do you railroad men working in yards, have what is known as a blue flag?

A. Yes, we do.

Q. What does that mean, the blue flag?

A. Well, that means that no switch engine, or any other railroad engine, switchmens, or anybody shall couple any more cars into the car that the blue flag is on.

Q. Does that mean men working about the cars?

A. Yes, it means men are working about the cars.

Q. About what time of day, if you recall, did you get to the cars on the pullman spur South of the depot, if you remember?

A. I can't give you an exact time. It seems to me like though it was before lunch, not long before lunch.

[fol. 159] Q. Was there a blue flag in place anywhere about those cars when you went to work on them or inspected them?

A. I'll declare I can't remember that.

Q. Have you worked with Mr. Arnold, the Plaintiff here?

A. Yes, I have.

Q. Before he got hurt?

A. Yes, sir.

Q. Now that is before January 16, 1952?

A. Oh, yes.

Q. About how long had you known Mr. Arnold before he got hurt?

A. Well I have known him ever since I have been working for the railroad, about 15 years.

Q. Now before he was injured, was there anything wrong with him, as far as you could observe, in the way and manner he walked about and did his work?

A. No.

Q. Was he enjoying good health before his injury?

A. Yes, sir.

Q. Have you worked with him since then?

A. Yes.

Q. Do you remember about the first occasion that you worked with him after he got hurt, soon after, the next day or so.

A. Yes, I believe he came back to work the next day after he got hurt.

Q. Were you assigned to help him on any job after he got hurt?

[fol. 160] A. You mean when he immediately came back to work?

Q. Or at any time since?

A. Oh yes, I have since then.

Q. Who gave you such instructions to help him?

A. The Car Foreman, Mr. Caldwell.

Q. Have you worked with him off and on since January 16th, 1952?

A. Yes, I have.

Q. Around the depot and down the tracks?

A. Yes.

Q. What do you call those tracks down South of the depot, oh about a couple of miles, repair tracks?

A. It is what we call the lower yard down there and there is a repair track down there.

Q. Have you recently worked with him in the lower yards and around the station?

A. I have.

Q. Now before he got hurt, before January 16, 1952, did you ever observe any limp in his walk?

A. No.

Q. Have you since.

A. Yes, I have.

Q. Has that existed ever since he got hurt, the limping?

A. Yes, it has.

Q. State whether or not since his injury he gets about in his work, while walking with his body straight and erect or bent and stooped? Just describe to the Jury [fol. 161] how he carries his body about in his work.

A. Well, it is a little hard to describe. It seems that when he walks he tries to walk without moving his back, that is about the best way I can describe it.

Q. He walks with a stiff back?

A. Yes.

Q. Did you ever observe that before he got hurt on January 16th 1952?

A. No.

Q. Have you taken any of the heavier work, the heavy duties off of him since he got hurt?

A. I have.

Q. What part of the heavy work have you done for him?

A. Well, not long after he was hurt, he complained of not being able to break what we call the steam hose on the passenger trains and the Car Foreman instructed me to come with him to work the passenger train each morning and break the steam hose for him, and stay with him until after the passenger trains left this station.

Q. Now when was the last time you worked with him?

A. The last time I worked with him was about ten days ago. I don't remember the exact date, but about ten days ago we were working on a de-railment.

Q. What kind of work do you have to do in connection [fol. 162] with the de-railment?

A. We had some jacking, jacked the cars from the trucks back on the rails.

Q. Is that pretty heavy work?

A. Yes, sir.

Q. Did Mr. Arnold help you in that?

A. Yes, sir, he did.

Q. Did you observe anything unusual about the way and manner he did it, the heavy work?

A. Well yes, he is not a very good hand on the jacks since then. He can't reach very high or pull very much on the jack handles.

Q. Now, on the job of Car Inspector, is it necessary to inspect the cars, to go up on top of them sometimes, go up a vertical ladder?

A. Yes.

Q. Go under them?

A. Yes, sir.

Q. Through them?

A. Yes, sir.

Q. Open and close doors?

A. Yes, sir.

Q. Connect air hose and disconnect?

A. Yes, sir.

Q. Have you seen Mr. Arnold climb up the vertical ladder up the side of a car since he got hurt?

[fol. 163] A. No, I don't believe I have ever seen him try to climb a ladder since he got hurt.

Q. Did you see him before?

A. Yes, sir.

Q. How about jumping the couplings, getting from one side of the train to the other?

A. I believe I have seen him go through the cars, I know I have.

Q. Before or since or both?

A. Both.

Q. Any difference in the way he does that?

A. Oh, yes.

Q. Just tell the Jury about what is that?

A. Well he always, when he attempts to pull himself up on the coupler or whatever he steps on to get through the

cars, he does it with a great deal of effort and as though it were painful to him, and sometimes it seems like it is pretty hard for him to get up on the coupler. We always crawl over the coupler when we crawl through the cars.

Q. Was it any effort for him to do that before he got hurt?

A. No.

Q. Now has he worked continuously since his injury or has he been working—work awhile and off awhile?

A. He hasn't worked continuously no.

Q. Be off awhile and then come back to work?

[fol. 164] A. Yes, sir.

Q. Do you remember that he went to the Santa Fe Hospital in Topeka, Kansas a time or two since he got hurt?

A. Yes, sir.

Q. And have you worked with him some after he came back from the hospital?

A. Yes, sir.

Q. Would he be able to do his work better when he first came back?

A. Well it seemed like when he first come back he would be better.

Q. And how long would that last? How long would he be able to keep up his end of the job before he goes down?

A. Well usually you can tell a difference in just a few days.

Q. In your car inspection work have you—or his car inspection work, whatever he was doing, have you had occasion to see him try to open and shut car doors since?

A. Yes, sir.

Q. Is there anything unusual about the way he does that?

A. Well he won't attempt to pull very hard on one. When he does, he usually stops and grabs his back or holds his back and tries to straighten up, and acts like that it is a painful situation to him.

Q. How about pulling these Journal boxes?

A. The same way with that.

[fol. 165] Q. Did he carry his end of it all of the time before he got hurt?

A. Yes, sir, he did.

Mr. Bean: Pass the witness.

Cross-examination.

By Mr. Cobb:

Q. After he got hurt, how long was it that you noticed that he started limping?

A. Well now, it has been a long time and it's pretty hard to remember the exact time on that, but it seems to me like it was within the next two or three weeks after he got hurt before I noticed him limp.

Q. Two or three weeks after he got hurt?

A. Yes.

Q. Now has Harry complained from time to time about aches in his back to you?

A. Yes, sir. Yes, he has. I have asked him about it several times, if it bothered him at night and things of that kind and he always told me that it did.

Q. What part of his back did he complain of principally?

A. I don't know that he ever pointed it out to me. Just referred to it as his back. Just said his back hurt.

Q. Is that right?

A. Yes, sir.

Q. What complaint did he have about his leg, what [fol. 166] caused him to limp?

A. I don't know as he ever complained to me about a leg. I wouldn't call it a limp. It is not what you would call a limp, as I said awhile ago he walks like he is trying to walk without moving his backbone.

Q. Without moving his back?

A. Yes.

Q. How long have you worked with Mr. Arnold altogether?

A. Well off and on we have worked together for a period of oh, about 11 or 12 years.

Q. Most of that has been right here in Lubbock?

A. Yes.

Q. He is not known as a Car Inspector now, is he, or is not doing that kind of work?

A. Well, yes, I would think so. He is not what we call a Yard Inspector, but he works on what we call the repair tracks and he does have to inspect the cars that are there on the repair tracks.

Q. On the repair tracks?

A. Yes.
Q. Is he a head man?
A. You mean on the repair tracks?
Q. Yes.
A. Yes, he is.

Mr. Cobb: Pass the witness.

[fol. 167] Further cross-examination.

By Mr. Smith:

Q. Mr. Lemon, I believe you said that in all of the time prior to January 16th, 1952, I just want to be sure if I understood you, you never did see the Billings' trucks pull forward out of this area?

A. I have seen them pull out that way on rare occasions, but it wasn't a common practice for them to do that.

Q. Which way did they go?

A. I believe I have seen them go both ways.

Q. Did they do that in one of these large van trucks, or was it a smaller vehicle?

A. It wasn't a trailer truck, it was what we call a bob-tail truck.

Q. I will ask you to look at Defendant's Exhibit Number 3, the truck pictured there, did you ever see such a truck as that pull forward out of that area?

A. I can't tell whether that is a trailer truck or a bob-tail, can you?

Q. No, I sure can't. Maybe D-1 will give you a better view of it.

A. Well, yes, that is what we call a bob-tail truck. Yes, that is the type truck that they use there nearly all the time.

Q. I will ask you to think very carefully as to whether you can say you have actually seen a truck of that kind, prior to January 16th, 1952, pull forward and drive out [fol. 168] of that area instead of backing up—instead of coming back out the same way it came in?

A. Yes, I believe I have.

Q. But if you did, it was very very rare, is that right?

A. Yes, it would be on very rare occasions when they did that.

Q. Anytime you saw a truck in here whether he was headed with the front toward this way or the back, you knew he was coming back out the same way he went in ordinarily, didn't you?

A. Yes.

Q. And everybody that worked out there for a number of years——

Mr. Gallagher: Just a second.

Mr. Smith: Let me rephrase the question. I will withdraw the question.

The Court: All right, go ahead.

Q. Mr. H. T. Arnold, you say had been out there eleven or twelve years while you were working there, is that right?

A. That's right.

Q. And of course he worked in and around the same area that you were in and around?

A. That's right.

Mr. Smith: That's all.

[fol. 169] Redirect examination.

By Mr. Bean:

Q. You came from the repair track down to the Court House today, didn't you?

A. Yes, sir.

Q. Do you need to go back now?

A. Yes, I do.

Mr. Bean: That's all.

The Court: Call your next witness.

[fol. 170] Marion Townsend having been first duly sworn testified on direct examination by Mr. Gallagher as follows:

Q. What is your full name?

A. Marion Townsend.

Q. Marion——

A. Yes, sir.

Q. Townsend?
A. Yes, sir.
Q. Are you a married man?
A. Yes, sir.
Q. You live in Lubbock?
A. No, sir, I live in Slaton, Route 1, two miles West of Posey.
Q. Out of Slaton?
A. Yes, sir.
Q. Do you work in Lubbock?
A. Yes, sir.
Q. Are you a married man?
A. Yes, sir.
Q. How long have you lived up there on the route out of Slaton?
A. Since 1926.
Q. What kind of work have you been doing while you have been living up there?
A. Well farming and railroading.
Q. Are you now employed?
[fol. 171] A. Yes, sir.
Q. For what Company do you work?
A. Santa Fe.
Q. Is that the Panhandle and Santa Fe Railway?
A. That's right.
Q. Railroad. When did you begin working for them?
A. Well, I began in 1949, but I worked through the other war about five years and I quit about—two years of farming and I went back to work for them in 1949, all told about ten years.
Q. Your work was interrupted by the last war?
A. Yes, sir.
Q. World War II?
A. Yes, sir.
Q. That was in 1942?
A. Somewhere along there.
Q. How long were you in the service?
A. I was in there about five years then, up until I quit, you know.
Q. And steadily now, you have been working for the Panhandle and Santa Fe about how long?

A. About—close to five years this last time.

Q. Do you work in the—for the Company here in Lubbock? I believe you said you did, didn't you?

A. That's right.

Q. Do you work in the car inspecting department?

[fol. 172] A. Yes, sir.

Q. What is your classification down there as a worker?

A. Well at the present time I am a laborer. I have been Journal Inspector.

Q. Journal Inspector?

A. Yes, sir.

Q. That's the boxes on the running gear of the car?

A. Yes, sir.

Q. Do you know Mr. Arnold, the man back here?

A. Yes, sir.

Q. How long have you known him?

A. Something like two years.

Q. Have you been—have you had occasion during the last two years to be working side by side with him?

A. Something about like nine months.

Q. The last nine months?

A. Yes, sir.

Q. During the last nine months you were working in the Inspecting Department—were you working in the Inspecting Department?

A. Yes, sir.

Q. Did you say you worked side by side with Mr. Arnold?

A. Yes, sir.

Q. Now in your own way, in your own words, just tell us what work you have seen him do, just one by one?

[fol. 173] A. Well, I have seen him walk into cars and classify them for what commodity they are classified for and nail the tags on the sides of the cars and oiling the boxes and helping me along, closing car doors and straightening hand holds.

Q. What heavy, or work involving some exertion, have you seen him do?

A. Well that—on oiling boxes and straightening hand holds with heavy bars and closing those doors.

Q. Taking the closing of the door, what have you observed about him in the manner in which he closes the

door, how he does it and how it affects him as you see it?

A. Well, I generally always hold the trigger down you know, on the door first, and he has to get behind and push on the door and then if the door locks, or hits something hard I have seen him go down, you know, lean up against the side of the car and have to wait maybe a minute on him.

Q. What would be his appearance, his facial appearance?

A. Well, he would turn kinda pale.

Q. Did he have the appearance of a person suffering?

A. Yes, sir.

Q. Did he have any complaint about any particular part of his body?

A. Well, he said it hurt his back.

Q. What other work have you seen him do involving some exertion?

[fol. 174] A. Well, handling them large crow bars and straightening hand holds.

Q. What would the bar weigh?

A. Well, it will weigh, I suppose, around a hundred pounds, seventy-five, something like that.

Q. What effect would that have on him, any?

A. Well, if the bar slipped or anything like that I have seen him complain over it. Sometimes I have seen him drop the bar in picking it up.

Q. Have you observed his walking around?

A. Yes, sir.

Q. What is that like, normal or not?

A. No, he has got a limp to his walk.

Q. And is that with him everyday that you see him?

A. Yes, sir.

Q. Have you ever seen him work with his hands above his head, or climb up a vertical ladder since he has been hurt?

A. No, sir, I haven't.

Q. The heavy work, like lifting, what is the heaviest thing you have seen him lift?

A. Well, we have one large crow bar down there that will weigh around seventy-five or a hundred pounds, something like that. That is about the heaviest thing that I

know he has lifted, that I have seen him lift, and those car doors.

Q. How about the air hose?

[fol. 175] A. Well, I have seen him connect a few air hose, not many. I generally do that myself.

Q. You do it for him?

A. Yes, sir.

Q. How about the lifting of the Journal boxes?

A. Well, he won't pull those Journal Boxes. I am instructed to pull them for him.

Q. Take the—name five of the major parts of a car inspection, just name about a half a dozen of them.

A. Well, it's straightening those ladders and hand holds, closing those doors, oiling or lifting the box lids, Journal box lids, and I believe that is about all of the heavy work we have with us.

Q. How about climbing to the top of the cars, do you ever have to do that?

A. Well, I do that, he don't climb any of those box cars.

Q. Well, this question: does he do the greater part of the duties of a Car Inspector down there himself or somebody do them for him?

A. Well no, I don't think he does. I do that myself.

Mr. Gallagher: That is all.

Cross-examination.

By Mr. Cobb:

Q. On whose instructions do you do that work, Mr. Townsend?

A. Well, my foreman from Slaton was up here awhile back and he was asking us about oiling those boxes and [fol. 176] Mr. Arnold told him says "I can't lift the lids," and he just turned around and told me, said "Townsend, you pull the lids for him," and I have been doing it since.

Q. Now, who is that?

A. Mr. Caldwell.

Q. George Caldwell?

A. That's right.

Q. How long did you say you had known Mr. Arnold?

A. Well, something like two years. I was sent from Slaton up here.

Q. How long have you worked with them the way you have been working with him now?

A. Well I have been working with him I judge around nine months.

Q. When did you first notice that Mr. Arnold had trouble in his back?

A. Well ever since I first got acquainted with him, I heard some of the boys talking about Harry having a limp, and I noticed him along walking that way ever since I have known him.

Q. Has he ever complained to you about his back hurting?

A. Yes, sir, everyday.

Q. Everyday?

A. Yes, sir.

[fol. 177] Q. Did he have any other complaints besides his back?

A. No that is all I ever heard him complain about.

Mr. Cobb: Pass the witness.

The Court: Do you have any questions, Mr. Smith.

Mr. Smith: I believe I have no questions.

Mr. Gallagher: May I ask one further question.

The Court: Yes, sir.

Redirect examination.

By Mr. Gallagher:

Q. Does he appear, does Mr. Arnold appear to be more active, and a better worker now than he did six months ago, or is he remaining the same, or getting worse in his work?

A. Well it seems to me that he is kinda getting a little weaker to me. I know the last day I worked with him, Tuesday, he says "I am just barely holding on," and so I taken the whole thing over Tuesday, in my own hands.

Mr. Gallagher: That is all.

Recross-examination.

By Mr. Cobb:

Q. That was Tuesday of this last week?

A. Yes, sir.

Q. Do you recall him being off back in the middle of the summer long about June?

A. Yes, sir, I remember him being off.

Q. Did he get weak along about that time, too?

[fol. 178] A. Well, I didn't see Mr. Arnold while he was off. Some said he went to the hospital, but I don't know for sure where he was at.

Mr. Cobb: That is all.

Mr. Gallagher: Thank you.

The Court: You may step aside.

Mrs. Eva Arnold having been first duly sworn testified on direct examination by Mr. Gallagher as follows:

Q. You have been sworn haven't you, Mrs. Arnold, the first day?

A. Yes, sir.

Q. What is your first name?

A. Eva.

Q. You are the wife of Harry Arnold here?

A. Yes, sir.

Q. That's right, isn't it?

A. Yes, sir.

Q. You have one child?

A. We have one daughter living with us at home.

Q. You live here in Lubbock?

A. Yes, sir.

Q. On First Street?

A. Yes, sir.

Q. You and Mr. Arnold were married back when?

[fol. 179] A. November 1st, 1930.

Q. 24 years ago?

A. Yes, sir.

Q. And you all have lived together steadily since that time?

A. Certainly.

Q. You recall do you, please, about the middle of January 1952, that your husband came home during the day time hurt?

A. Yes, I certainly do.

Q. Were you at home when he got there?

A. Yes, I was there.

Q. Did you see him before he came into the house?

A. No, I didn't.

Q. Did you see his face, what it looked like?

A. Yes.

Q. What did his face look like?

A. Well, he was pale and one side of his face looked like it had been rubbed against something.

Q. Did you later learn what happened to his face?

A. Yes, I surely did.

Q. What was that?

A. Well he told me about the injury he had had, and he just told me how it happened as near as he could.

Q. Mrs. Arnold, before that happened, and during all of your married life, before he got hurt out here in the railroad, was your husband a good worker and an able bodied man?

[fol. 180] A. Yes, he certainly was.

Q. Did you ever know him to have any trouble with his back of any character, before he got hurt for the railroad here?

A. None that I know of.

Q. Before he was injured out here on January 16th, 1952, before that time did he walk evenly on both feet, that is without any limp?

A. Yes, sir.

Q. Did you know about his having his leg broken in 1926?

A. Yes, he told me about it.

Q. That was before you got married?

A. Yes.

Q. Ever any trouble with that since the time you all were married, or before it?

A. None, that I know of. He walked straight.

Q. Now when he came—Mr. Arnold, your husband came home how did he rest that night, do you recall now?

A. Yes, I do. He didn't rest any, and neither did I.

Q. What was the difficulty, I mean how did he act?

A. Well, he tossed and he just didn't sleep. I think he would close his eyes and he rested maybe a few minutes at a time but very fitfully.

Q. Did you do anything for him like home treatments?
A. Oh yes.
Q. What?
[fol. 181] A. Well, such as hot water bottles and linament and anything that I could do to make him more comfortable I tried to do it.
Q. What was he complaining about, what part of his body rather was he complaining about most?
A. Well, his neck and his back all the way down hurt worse, seems like his arm didn't hurt him too bad. Seem like it was more numb than anything.
Q. His arm was?
A. Yes, sir.
Q. Did he manage to get back to work the next day?
A. Yes, he did. He was—he always wanted to work.
Q. Did he work the next day?
A. Yes, he did.
Q. And on and off until about what time before he was compelled to quit?
A. I don't know just how long it was, but I know it was just a few weeks until he began to complain a lot worse. Seemed like he began to feel soreness and pulling in the muscles in his back and through his side.
Q. Let me refresh your memory, if it was not around the first of March that he quit for a few days, say ten days?
A. I believe it was.
Q. Did he go to any hospital then, if you know?
A. I believe that is the first time that he was sent to the hospital in Topeka.
[fol. 182] Q. And then he came back home and went back to work again, didn't he?
A. Yes.
Q. Do you remember, now if you don't remember that is all right, do you remember the next time he quit work and went away?
A. I don't remember the exact date right now. I know that he didn't work very long before he went down hill again to where he needed to go back. In fact he was ailing all of this time, hurting and had pain.
Q. Now without too much detail, from the time he got hurt in the middle of January 1952, to the present time, November of '54, about how much time—was he away from

work on account of his injuries, whether he was in the hospital or at home?

A. Oh say, approximately a year and a half.

Q. As a rule about how much time between one quitting for a hospital and the next one, about how much?

A. I don't believe I heard your question.

Q. About how long would it be, like he had to quit the first of March, how long would it be before he had to quit again?

A. Well, I guess according to the way he felt. It would be several months maybe, maybe six weeks, maybe three or four weeks or even more.

Q. Judging your—the way your husband gets around today, or yesterday, I will ask you whether or not he is —appears to be better or more active now than he was a year ago?

[fol. 183] A. No, I would say he was less active now.

Q. Do you believe that he is getting worse, judging from your observation?

A. He is not getting any better.

Q. At nighttime now, as night after night goes by, the usual run of the night, how does he rest now?

A. Well he hardly sleeps and he is always drowsy during the daytime, but at night he rests fitfully, and he is up several times in the night, maybe getting aspirins and hot water bottles, I sometimes do these things for him.

Q. Do you try to give any medication like alcohol, rub him with alcohol or anything like that?

A. Well occasionally.

Q. What part of his body does he complain most of now?

A. Well his shoulders and neck and his back. The lower part of his back.

Q. And I will ask you whether or not, since he got hurt, since he got hurt out here for the railroad, whether he has walked with a limp since that time?

A. Yes, he has.

Q. I will ask you whether he walks now with his body erect or otherwise, and describe how?

A. No, he walks with a twist and a strained appearance, it seems. A twist and a strained appearance.

Q. Does he lean forward in his walk?

[fol. 184] A. Yes, slightly.

Mr. Gallagher: That is all.

Mr. Cobb: No questions here.

Mr. Smith: I have no questions.

The Court: You may step aside.

Mr. Gallagher: All parties, plaintiff and defendant agree that in accordance with the experience mortality table that the plaintiff reasonably has a life expenctancy of 22.12 years.

Parties further stipulate that the driver of the said Billings' truck, Joe Stone, upon the occasion in question was then acting in the due and regular course of his employment with the said R. A. Billings, the defendant herein.

The defendant, Panhandle and Santa Fe Railway Company agrees that the work that the plaintiff was doing upon the occasion in question was a part of and in furtherance of inter-state transportation or traffic, and was doing work on baggage coaches by way of inspection to be used and had been used in inter-state commerce.

The Court: Is that agreed and stipulated?

Mr. Cobb: Yes, sir.

Mr. Smith: Yes, sir.

The Court: Let the record so show. What says the plaintiff?

Mr. Gallagher: The plaintiff rests.

[fol. 185] The Court: What says the defendant, Santa Fe Railway Company?

Mr. Cobb: Mr. Pumphrey.

H. C. Pumphrey, having been first duly sworn testified on direct examination by Mr. Cobb as follows:

Q. State your name, please.

A. H. C. Pumphrey.

Q. Where do you live Mr. Pumphrey?

A. 2103 9th Street in Lubbock.

Q. By whom are you employed?

A. Panhandle and Santa Fe Railway.

Q. What is your work for the Panhandle and Santa Fe?

A. Local Agent at Lubbock.

Q. How long have you been local agent here?

A. I have been Local Agent at Lubbock since September 1, 1947.

Q. Do you know Mr. Harry Arnold back here?

A. Yes, sir.

Q. He is also an employee of the Panhandle and Santa Fe, is he not?

A. Yes, sir, he is.

Q. Mr. Pumphrey I hand you here an Exhibit marked D-1. I will ask you if you will look at that Exhibit and see if you can tell what it is?

[fol. 186] A. Well, that's a view of the Passenger Depot at Lubbock, looking North from the South end of what is known as the Pullman Spur.

Q. Is that the old passenger depot you see back there in the distance?

A. Yes, it is.

Q. That has been destroyed now and a new depot erected, is that right?

A. Yes, sir.

Q. Mr. Pumphrey, were you agent in Lubbock when that drive-way there was laid out, prepared?

A. Yes, sir, I was.

Q. Do you remember when that was?

A. Well it was during the early part of December in 1950. It was—I don't know just the date, but it was just before Christmas, sometime in December, before Christmas in 1950.

Q. Please state if you know what was there before that drive-way was put in?

A. Well, it was just a narrow walk-way, about, oh I would say it wasn't wide enough for a highway vehicle, it was just a walk-way down there. We had at one time operated a train out of that track and we let the passengers board from that side.

Q. How long has it been since you operated a train off of that track, when the passengers used that area?

A. I believe that train was discontinued in '48, it might [fol. 187] have been '49. It was '48 or '49.

Q. At any rate that was before you put the gravel in this area in there as it exists at this time, is that correct?

A. Yes, sir, it was.

Q. What reason did you have for widening that out and gravelling it?

A. Well, to be used by mail trucks in loading and unloading mail from the baggage car that sits on the Pullman spur.

Q. Now did Mr. Arnold work in that area at any time?

A. Yes, some. The car men had some work on those baggage cars, inspecting them and so on at times.

Q. Did Mr. Arnold ever make any complaints to you about the Billings' trucks using that drive-way?

A. No, sir.

Q. Never at any time?

A. No, sir.

Q. Do you recall an incident on January 16th, 1952, when Mr. Arnold was—alleges he was injured?

A. Well, I wasn't present at the place of injury. I recall Mr. Arnold coming into my office and telling me that he had an injury.

Q. What did he say at that time, Mr. Pumphrey?

A. Well, I was seated at my desk and he just walked into the office and leaned over and placed one of his arms, I don't remember which one, down on my desk and remarked that the mail truck had backed over him, and I [fol. 188] took him to mean it backed over his arm since his jacket, I believe it was a cordurory overall jacket, and it looked like it was dirty on the sleeve there. I suggested that we had better get him to the doctor and he said that someone was available there to take him. That is about the only conversation we had.

Q. Did you give him an order to the doctor at that time?

A. No, due to the emergency existing, why we usually just send the order later. The doctor goes ahead and treats him and gets the order later.

Q. Mr. Pumphrey, have you watched those mail trucks from time to time loading and unloading mail, from that drive-way?

A. Yes, I have.

Q. State, if you will, how the mail truck usually gets in there.

A. Well I think at the present time, that they are usually backing in, they could either head in and drive up the drive

and back out or they can back in and head out. It is a one way drive. They can't get out at the North end.

Q. You say they can't get out at the North end?

A. No, sir.

Q. Why?

A. Well there is no entrance there or exit either. It abuts up against our station platform.

Q. Could they get out at the North end with one of those large mail trucks?

[fol. 189] A. I don't believe they could. We have some obstructions up there in the form of a telephone now. We formerly had an escape valve for steam there and I don't think a truck could have hardly got between it and the track. We never have had to drive up through there.

Q. Do you ever recall one of Billings' trucks being up in front of the depot there on the East side of the depot?

A. No, sir.

Q. Did you ever see one out there?

A. On occasion we might have had some trucks drive up on the platform and we immediately asked them to move off because we don't permit vehicles on the platform.

Q. That is a passenger platform, is it not?

A. Yes, sir.

Q. How long have you known Mr. Arnold?

A. Well, since moving to Lubbock, January—February 1, 1947.

Q. Are you his direct superior or——

A. No, sir, I am not. Of course all of the employees working for the Santa Fe at Lubbock indirectly probably are under my supervision, but he works directly under the mechanical department.

Q. Who would be his immediate superior?

A. Mr. Caldwell, I believe, he is located at Slaton, George Caldwell.

Q. Do you know Mr. Fertig?

[fol. 190] A. Mr. Fertig is master mechanic, he would be immediately above Mr. Caldwell. I think Mr. Caldwell works under Mr. Fertig, and the car men, like Mr. Arnold, are under Mr. Caldwell.

Q. So far as directing the work to be done by Mr. Arnold, would that be your duty?

A. No, sir, it would not.

Q. Whose duty would that be?

A. I rather think it would come from Mr. Caldwell. If we had any cars to be repaired I would notify the car men what was necessary, but I wouldn't supervise the work.

Q. I believe you said that Mr. Arnold had never complained to you about the Billings' trucks, is that correct?

A. No, sir, he never did.

Mr. Cobb: Pass the witness.

Cross-examination.

By Mr. Gallagher:

Q. Mr. Pumphrey, is that your name?

A. Yes, sir.

Q. You see that truck in that Defendant's Exhibit Number 2, don't you, the rear of it?

A. Yes, sir.

Q. Do you know what kind of a truck that is?

A. You mean the——

Q. The make?

A. —trade name—No, sir, I don't.

[fol. 191] Q. Do you know what capacity that truck is?

A. No, sir, I don't believe I know the capacity.

Q. Do you know the width of that truck?

A. No.

Q. Will you estimate the width of that truck, overall width, rear?

A. I assume it is a standard truck, we are still using it down there, but I couldn't tell you off hand how wide the truck is.

Q. Would you say it was nine feet?

A. I don't believe it is nine feet.

Q. Would you say it is eight and a half feet?

A. No, I wouldn't say, because I definitely don't know what the standard width of a truck body is.

Q. Now do you know how wide the passage way is, there, call it drive-way or call it foot-way?

A. No, sir, I don't know exactly other than we constructed what we considered wide enough to accom-adate those mail trucks.

Q. The question was do you know how wide it is?

A. No, sir, I don't know.

Q. Well, whatever the width of the truck in the rear, and whatever the width of the driveway, there isn't very much clearance to the right and the left for a truck to get out of there, is there?

[fol. 192] A. I don't understand the question.

Q. My question is this: do you have very much clearance between the trucks and the train, and the coach, in backing out?

A. No, I would say about two feet, maybe three, but not over three at the outside, possibly two feet.

Q. Three. How much on the other side?

A. Well, there wouldn't be any if you had it plumb over to the other edge. If you are in the middle of it, probably be about a foot and a half on each side.

Q. Well, if you were going to build a drive way to accom-adate that truck, wouldn't you give it enough room to back out on?

A. Yes.

Q. If you put that truck in the middle of the drive way, like you are driving down the center of the road, there won't be a foot on either side, will there by measurement?

A. I believe there would be.

Q. If one of your men is coming out from between those cars, and they do come out that way don't they?

A. Well it is not absolutely necessary I don't think.

Q. How would they get out in case they are connecting an air hose?

A. Well, I wouldn't get out.

Q. Jump over?

A. No.

Q. How would you get out?

[fol. 193] A. Well, I wouldn't expect the truck and man to occupy the drive-way at the same time.

Q. What's that?

A. I wouldn't expect the truck and the man to occupy the walk-way at the same time.

Q. One of them has got to give away, don't they?

A. Just like any other drive I should think.

Q. And that is used by your laborers down there isn't it, that walk-way?

A. Well, you mean in performance of their duties.

Q. Yes, sir.

A. I assume that they would walk up and down there.

Q. And if one is on the other has got to get off?

A. That is true, yes.

Q. Now it isn't a very good drive-way is it?

A. Well, we thought it was a good one.

Q. It didn't turn out to be so good, did it?

A. I couldn't answer that.

Q. It hurt a man, didn't it?

A. We are still using it.

Q. I know, it hurt a man though, I know you are still using it. It hurt a man, didn't it?

A. Well I couldn't answer that.

Q. You knew that when you gave him an order to go to the doctor, didn't you?

[fol. 194] A. I suggested that he go to the doctor, yes.

Q. You hurt a man down there, didn't you?

A. I don't know, I wasn't there.

Q. Well, he told you didn't he?

A. Yes, sir, he told me.

Q. O. K. Now isn't it a fact, don't you know that that was enlarged there from an ordinary walk-way to its present width and put big light posts there to afford light so you could load night passengers on there, on the pull-man?

A. No, sir.

Q. Did you ever do that?

A. No, sir.

Q. If a man is backing that truck back out of there, like you say they are going to back it out——

A. Yes.

Q. Can you back it out and look in the right rear mirror?

A. I never drove a truck on that drive in my life.

Q. Do you know anybody else that ever drove one on that drive excepting Billings?

A. No, sir, I don't.

Q. If you are going to drive a truck out of there and keep it on the hard surface, isn't the only way you can do it is look down at the curbings, right down by the driver's running board?

A. I never drove a truck on it.

Q. You don't know. So, looking at that picture, if a man doing the work of car inspecting, the only really safe [fol. 195] thing to do, with people operating that kind of an arrangement there is to peek out before you come out, isn't it?

A. Well, I don't know, it would just depend on what kind of position you are in.

Q. Let us look at it another way, the same way, if a truck is whizzing by at 15 miles an hour, going back like you say, you do want him to do that, don't you?

A. If they head in they would have to back out.

Q. Well they can get out another way, can't they?

A. No, sir.

Q. We will see about that in a minute. In going back by, if one of your men comes out from between a car, having connected an air-hose, the only safe thing he can do is to stick part of head out and peek, isn't it, in safety, in complete safety?

A. I think he should look before he went out.

Q. That is a pretty hazardous situation you have got there, isn't it?

A. I don't think so.

Q. Pretty dangerous, if that is the kind of care you have to do to do your work, isn't it?

A. I don't think so.

Q. You think it's perfectly safe to have a man walk out with a truck whizzing by?

A. I think a man should watch for a vehicle on any passageway.

[fol. 196] Q. This is not supposed to be a public thoroughfare?

A. No, it's not a public thoroughfare.

Q. But if you have to do that kind of caution in performing your work it is going to slow you down a lot, isn't it?

A. Well, I don't know.

Q. Wouldn't it?

A. I wouldn't think it would affect your work any.

Q. Well, if you step out there you are going to get hit, aren't you?

A. I imagine you would, if a truck was coming and you stepped out in front of it.

Q. And the driver is not looking and is coming backwards, it creates a dangerous situation doesn't it?

A. I wasn't present. I don't know just what you are——

Q. I am asking you and you can answer me, I believe.

A. What is your question?

Q. My question is this: the actual measurement of that walkway there where the truck goes back, call it what you want, is ten feet and seven inches—eight inches, steel tape measurement?

A. I never did measure it.

Q. Will you assume that for this question to be correct?

A. Yes, sir.

Q. Because it has been measured. Now the truck occupies virtually all of the passageway, does it not?

[fol. 197] A. If it is nine feet wide it would, yes.

Q. Now when a man comes out and working—and backing a truck back there, like Mr. Arnold was, at the right rear of that truck facing as the driver does, where it is blind to the driver of the truck, and coming back within a foot or so of the side of the car makes a dangerous situation, doesn't it?

A. I wasn't there. I didn't see it.

Q. I am—you can answer my question please, sir. I wish to be courteous, but I want an answer.

A. You are telling me, if it comes back like that man was coming back, I don't know how he was coming back.

Q. Well, I will tell you. Suppose he is coming back, backing that truck back there now with that clearance of a foot or so from the edge of the car, with your man coming—going in and out of cars, don't you know that it is a dangerous situation for the man?

A. It would be dangerous for anybody to step out from behind the truck.

Q. You knew of that situation—that dangerous situation, didn't you?

A. No, sir.

Q. You knew if the trucks had been using that it was dangerous, didn't you?

A. We are still using it.

Q. Then you still know it is dangerous?

[fol. 198] A. I do not. I don't consider it dangerous.

Q. Isn't it reasonable, that if you are going to build a road for their trucks, isn't it reasonable that you are going to make it large enough to run a truck over?

A. We didn't build it for a road.

Q. Did you build it for their trucks?

A. Yes, sir, for that particular truck.

Q. Is it part of your obligation of the railroad to provide a road for the trucks?

A. Well, we are probably responsible for providing a way for them to get to it, to receive the mail out of the cars.

Q. Your men, your railroad men, load it out of the cars and you can load it out on a baggage wagon, can't you?

A. Yes, we could, but it would require a little more delay.

Q. A little extra work would save a life, or save an injury. It has been done down there that way, hasn't it?

A. We have always unloaded the mail out of the cars direct, the Lubbock mail, the Star Route mail, we'd put it on the baggage trucks.

Q. You can load the mail on baggage wagons and haul it out like the express, can't you?

A. It is possible.

Q. Well, it has been done that way?

A. Not the Lubbock mail.

Q. Well, I don't care what mail, but mail has been han-

[fol. 199] dled that way, hasn't it?

A. We handle mail that way everyday.

Q. Is now—the distance over here to the East side, to the East side of those cars of that spur track or pullman track, how much space is there over here?

A. I never did measure that.

Q. Isn't it 17½ feet or something like that from there to there? (Indicating.)

A. On the station platform I imagine it is approximately that.

Q. Well, could a truck move up there and unload from these doors?

A. We had done that prior to the time we put the platform there, we used to just have a drive on that side, but

we put the drive on the other side and lengthened out our platform for baggage trucks.

Q. Wouldn't that be safer with more room over here to your right?

A. No, that is adjacent to the main line.

Q. Well, I mean so far as your workmen are concerned. I know you have got locomotives going up and down there. Wouldn't it—you have got more room haven't you to handle it?

A. There is no drive-way over there. That is a platform now. We did away with the drive and made a platform over there for people to walk on.

Q. It wouldn't hurt to drive on it, would it?

A. We don't allow vehicles on it. It doesn't have enough [fol. 200] base under it to withstand highway vehicles.

Q. Now couldn't you have built, if you are going to use trucks on this, couldn't you have built that four or five feet wider?

A. Yes, we could have built it as wide as a highway, if we had thought it necessary.

Q. Well, you need a little more room we have found out, don't you?

A. I don't know as we do. We are still using it.

Q. Could that truck, the Billings' truck on the occasion in question, if that is about the correct way it is parked, could it have pulled up to its left a little bit, backed out and driven out in safety?

A. No, sir, I don't believe it could, the end of the baggage car you see comes right there near this corner of the passenger depot.

Q. He could have pulled up to the left and backed out there and gone down there?

A. Well, if you back out there, you back up on the depot platform, walk-way for people, and if you turn around the other way you run out on the lawn.

Q. Well, there was sufficient space, except you would get on the grass a little bit?

A. No, I don't think so. I don't think he could go through there.

Q. You say that you can't go around that way and across [fol. 201] and go over there?

A. Well like you could drive a truck through this building, you could, but there is no drive there.

Q. I am asking you this question. You understand my question?

A. Yes, sir.

Q. Can you drive in front of that station and go around that way?

A. You mean is it possible to drive on the platform?

Q. Yes, sir.

A. It is possible, but it is not permissible.

Q. Has it ever been done?

A. No, sir.

Q. Your office isn't right at the depot, is it?

A. No, sir.

Q. It is way up the tracks, isn't it?

A. I am usually present when they are loading and unloading mail.

Q. I asked where your office was.

A. It is about, oh, five hundred yards, I guess, the passenger station.

Q. You say nobody has ever complained about those trucks going in and out of there?

A. No, sir, not to me, never complained to me, no, sir, there hasn't.

[fol. 202] Q. You are sure of that?

A. Yes, sir.

Q. And at the time he got hurt Mr. Arnold told you about it?

A. When he came in the office that day he said one of the trucks had backed into him, yes.

Mr. Gallagher: That is all.

The Court: Do you have any questions.

Redirect examination.

By Mr. Cobb:

Q. Mr. Pumphrey, assuming that these are the baggage cars here on that pullman spur?

A. Yes, sir.

Q. This is the area in between the pullman spur and the main tracks?

A. Yes, sir.

Q. You have a platform in here do you not?

A. It is what we call black top, I believe.

Q. Black top?

A. Yes, sir.

Q. And what is that used for?

A. Well, that is for a passenger to walk on and to pull our baggage—what we call our platform trucks, baggage trucks.

Q. Baggage trucks. And also for passengers to get on and off trains from here on this main line?

A. Yes, sir.

Q. Now over here on this side of the gravel way is a [fol. 203] grass plot, is there not?

A. Yes, sir, a small park.

Q. A small park?

A. Yes, sir.

Q. There is no fence on the side of this gravel road here to keep anybody from walking on that grassy plot, is there?

A. No, sir.

Q. Employees or anybody else?

A. No, there is no fence there whatsoever.

Q. In fact, it is commonly used by employees and others to walk on, is it not?

A. Yes, it is.

Q. Now Mr. Pumphrey, state whether or not it is daily practice to stop pullman cars, passenger cars, or baggage cars, there on that pullman spur?

A. Yes, we set three cars in there each morning, from which we unload mail, and pick up three—the same three in the afternoon loaded out-bound.

Q. And that is done everyday, is that right?

A. Yes, sir.

Q. And that was being done that way when Mr. Arnold was run over, is that right?

A. Yes, sir, that's right, when he reported he had been struck by a truck, that's right.

Q. Now he inspected the cars that were set in there, did he?

[fol. 204] A. I couldn't say what he was doing. I wasn't present.

Q. How long have you worked for the railroad altogether?

A. 38 years.

Q. Have you had any experience yourself in inspecting cars?

A. Well, not as a car inspector, I haven't.

Q. You have watched it done during that period of time?

A. Yes, sir.

Q. Now how much time out of each day would it take him to inspect those three cars there on that pullman spur?

A. Well, I am not too familiar with that class of work, but I would say it wouldn't take over an hour to do what they do down there in connection with those cars, check them over.

Q. And service them?

A. That's right.

Q. Do you know whether or not he can inspect them from either side?

A. Well, from my view I would say that he could, but I am not a car man.

Q. In other words, in your opinion he could inspect them over here from this East side as well as from the West side?

A. I would think so, yes.

Q. But you have no direct supervision over him and you don't know?

A. No I have never been in the mechanical department.

Mr. Cobb: Pass the witness.

[fol. 205] Further redirect examination.

By Mr. Smith:

Q. Mr. Pumphrey, I believe you stated that your instructions, in other words the instructions of the railway company to Mr. Billings was that he should use this drive-way that was constructed for him in unloading those baggage cars, is that correct?

A. That's right. Would it be objectionable if I explained to you kinda what the procedure was, why it was built.

Mr. Smith: Go right ahead.

Mr. Gallagher: It was a responsive question. I would prefer it in question and answer form.

The Court: All right. Proceed. Mr. Smith go ahead.

Q. Mr. Pumphrey, what was the occasion and how did it happen that you built that area in there?

A. We formerly didn't have a long platform on the East side of the cars. We only had a chap drive over there and we would back the trucks up on that side and unload the mail, so when we got longer trains, we got to loading and unloading our passengers down on this chap platform, which didn't have too good a footing, so we decided that in order to put the platform over there for people to walk on we had to provide a drive some way to get to those cars to unload the mail and that is the reason for constructing this drive over on the West side of the cars.

Q. Did you construct a one-way drive?

[fol. 206] A. Yes, we did.

Q. Was there any provision made for a truck driving in from the South end and out at the North end?

A. No, a provision to drive in from the South end and leave from the South end only.

Q. Did you instruct the Billings' drivers that they should not drive out from the North across your platform?

A. Absolutely. The same was true when we were loading and unloading from the other side.

Q. Why did you prohibit that?

A. Well, we don't build our station platforms for highway vehicles. They just don't have enough base under them to withstand that kind of traffic.

Q. And also, what is that area used for, is it used for vehicles or what?

A. Just for people walking, just the same as sidewalks.

Q. Mr. Pumphrey, I believe you stated that you were out there many—usually when that mail was being unloaded in that area?

A. Yes, I visit those cars once, sometimes twice during the process of the unloading to see how everything is going.

Q. I will ask you whether or not you ever saw a Billings' truck whizzing backwards at 15 miles an hour in that area?

A. No, I never did see them going that fast.

Q. Did you ever see them going fast backwards out of that area?

[fol. 207] A. Well, I judge a fellow couldn't back out of there too fast because it is not wide enough. He would hit that car.

Q. A man would have to back cautiously, wouldn't he?

A. That's right.

Q. About how fast do they ordinarily back out of there from your observations?

A. Well, I don't know. I would say about as fast as a man could walk pretty fast, or maybe five miles an hour or something like that. That's just a guess.

Mr. Smith: Pass the witness.

Recross-examination.

By Mr. Gallagher:

Q. I would like to ask just one question. Did you intend to leave the impression that Mr. Arnold or any other car inspector can come up here on the East side of the cars, this line of cars and inspect them only from the East side, without going to the West side?

A. Well, my thought was, what he was inspecting was the air hose and that's in between the cars and not on the side of the cars.

Q. He wouldn't have to let any air out of the drum beneath the car?

A. No, I wouldn't think so. I am not familiar with that——

Q. If he did do that, it would be an utter mistake?

A. I couldn't answer that.

Q. You just don't know that much about it, is that right?

[fol. 208] A. I don't know anything about air brakes. I sure don't.

Q. And it so happens the air drum is beneath the coach here, underneath, and on the West or left side, that he couldn't get to that, by his inspection on the right side.

A. I tell you, I used to be a switchman and I never did bleed a car off except in between the cars.

Q. This was in between the cars?

A. I am sure it was. That is where we bleed the air off.

Q. Or under a car rather?

A. No, not under it, in between.

Q. You say it can't be done that way?

A. I never did now of it if it could. It is possible I guess.

Q. The fact is that he had to go over to the other side of the track, do you agree to that or not?

A. I don't know.

Q. Would it have been safer from the light of passing experience to have built a little run-around like you sometimes have in front of your private home garages, where that truck could turn around and come out safely, head on, where the driver could see where he was going, could you have built that run-around?

A. It is possible, by dispensing with part of the park you could have.

Q. Well safety is better than beauty, isn't it, in a case like that?

[fol. 209] A. Well, that's every man's opinion I guess.

Q. What is yours?

A. Well in my opinion they could come out the same and they go in without any hazard.

Q. That is what you still think, is it?

A. Yes, sir.

Mr. Gallagher: That will be all.

The Court: Any further questions.

Mr. Cobb: No.

The Court: Call your next witness.

JOHN L. FERTIG, having been first duly sworn testified on direct examination by Mr. Cobb as follows:

Q. Will you please state your full name, please sir?

A. John L. Fertig.

Q. John L. Fertig, you spell that F-e-r-t-i-g?

A. Yes, sir.

Q. Now, where do you live at the present time, Mr. Fertig?

A. I live at Fresno, California.

Q. And who are you employed by in California?

A. I am employed by the AT&SF Railway Company Coast Lines.

Q. Coast lines?

A. Yes, sir.

Q. What is your work out there, Mr. Fertig?

A. I am Division Foreman, located at Calwa.

[fol. 210] Q. Now by Division Foreman, what do you mean?

A. I have charge of all the local mechanical department work that is done at Fresno and Calwa. Calwa constitutes the yards for Fresno. It is just out of town a little way to get sufficient room.

Q. Before you went out there to work, where were you working?

A. I was stationed at Slaton, Texas.

Q. Slaton, down here about 16 miles, East of Lubbock?

A. Yes, sir.

Q. What was your work down there?

A. I was Master Mechanic on the Slaton Division.

Q. As Master Mechanic, did you have any men working under you?

A. Yes, sir, I had charge of all of the Mechanical Department, any mechanical work that was performed on the Slaton Division.

Q. Do you know Mr. Harry Arnold?

A. Yes, sir.

Q. How long have you known him, Mr. Fertig?

A. Oh, about the 1st of January, 1947 when I first came to the Slaton Division.

Q. Now, did he work under you?

A. Yes, sir, he was under my supervision.

Q. And where was he working most of the time?

A. He was working at Lubbock, Texas.

Q. What was his work here?

A. He was Car Inspector and was working on second shift.

[fol. 211] Q. That was in 1947?

A. Yes, sir.

Q. During the time that Mr. Arnold was working under you did you have occasion to observe his manner of walk?

A. Yes, sir, I did.

Q. Was there anything noticeable in the way he walked? Did he walk anyway out of the ordinary?

A. Well, he did have a rather peculiar walk in that he did limp slightly on his right side, right leg.

Q. When did you first notice that?

A. Oh, I think possibly I noticed that shortly after I came to this Division.

Q. That was in 1947 or '48?

A. 1947, when I first came.

Q. Now do you recall when a mail truck was supposed to have run over Mr. Arnold here sometime in January 1950—1952?

A. Yes, sir. That particular day, however, I was enroute to San Angelo. I was enroute to San Angelo, the day the accident actually happen-d.

Q. When did you first find out about it?

A. Oh, it was either on the evening of January 16th while at San Angelo or else it was the morning of the 17th when I went down to the Round House at San Angelo.

Q. When was the first time you saw Mr. Arnold after the accident?

A. Well it was on—around one o'clock on January the [fol. 212] 18th after I had returned from San Angelo.

Q. Where did you see him?

A. At this passenger station here in Lubbock.

Q. Just tell the Jury, if you will, what happened at that time?

A. Well, I came up to Lubbock shortly after noon on January the 18th and, of course, knowing about the accident whieh Mr. Arnold had had, why I talked to him and, as I remember it he was standing about the rear end of 93—94.

Q. By 94, is that a passenger train designation?

A. Yes, it is a passenger train which departs from Amarillo, and I asked him how he felt and if he had been hurt and he said, as I remember, that it didn't bother him much, he didn't have any bones broken, and I asked him if the truck really did run over his hand and he said yes, but it didn't break any bones.

Q. Was that the extent of your conversation at that time?

A. As I remember it is. That is just about all that was said.

Q. And was his physical condition called to your attention at a later date?

A. Well, it seems like that I might have been up to Lubbock in the next couple of days, and I think he told me at that time that he might have a splinter in his elbow, a slight fracture in the bone in his elbow. That first day it didn't bother him, on the 18th, the first time I saw him afterwards.

Q. Now Mr. Fertig, as master mechanic at Slaton, was Mr. Arnold's personnel file under your direct super-
[fol. 213] vision?

A. Yes, sir.

Q. Do you have that personnel file here with you?

A. Yes, sir.

Q. Were the entries concerning Mr. Arnold placed in that file as they happened in the normal and regular course of your business and your office procedure?

A. Yes, sir. Whenever any particular item comes up that refers to the personal record of any employee, it is conti ually filed on top of the previous file, so it is carried right up.

Q. Do those records show when Mr. Arnold first went to the employees association hospital at Topeka?

A. It shows the approximate date, yes, sir.

Q. Do you have that? Would you refer to it and tell us when that was?

A. (Witness looking at paper.) Well, I have a copy of a wire, I mean it is an original copy of a wire addressed to Mr. Hopkins, Dr. Hopkins at Topeka, Slaton, "March 7, 1952, H. T. Arnold went to Topeka on or about March 1st and can you advise when he will be released?"

Q. Now did Mr. Arnold secure a release when he first went up there to Topeka Hospital to return to duty?

A. He secured a release dated about March 6th.

Q. To turn to active duty?

A. Yes, sir.

[fol. 214] Q. Now when did he return to active duty?

A. Well, here is a letter from Mr. Arnold addressed to me, dated 3-6-52. "Dear Sir—Mr. J. L. Fertig, Master

Mechanic, Slaton, I returned on 93 today from hospital. I am sending you my release from Topeka. Dr. Procter said I could go to work Monday, March 10th on my regular job. Mr. Fertig, I am not able to do my regular work. If you want me to work like I have done since January the 16th I may have to do that." It is signed by H. T. Arnold.

Q. Now, did you put Mr. Arnold back to work at his regular duties?

A. Yes, sir.

Q. At any time while you were Master Mechanic down at Slaton did you furnish any extra help to Mr. Arnold in the performance of his duties?

A. Well, during those first few days after he was hurt, the Car Man that worked on the rep track here at Slaton did call on him to help him disconnect the steam hose. It is necessary on the arrival of train 75 to uncouple the steam hose between cars and between the locomotive and cars, in order to set out three baggage cars, such is the common practice.

Q. And he was furnished help during that period of time, is that correct?

A. Yes, sir.

Q. Now Mr. Fertig do you have there a computation as to the time that Mr. Arnold has worked and the money that he has received from the railway company since he was [fol. 215] injured on January 16th, 1952?

A. Yes, sir, I have a copy of that report.

Q. Do you have that there with you?

A. Yes, sir.

Q. Would you state to the Jury how much time he lost during the year 1952?

A. You mean in actual hours or money?

Q. In actual hours due to sickness.

A. Well, in January, which is the time of the accident, he lost 8 and 7/10 hours; in February he lost 8 hours; March lost 49 hours; April he lost the entire month, 176 hours; May the entire month, 168 hours; June the entire month, 168 hours; July the entire month, 176 hours; August, 8 hours; September, no time lost; October, no time lost; November, no time lost; December, no time lost.

Q. That was for the year of '52, is that right?

A. Yes sir.

Q. All right, for the year 1953 now.

A. In January 1953, he lost the entire month, 168 hours; February he lost the entire month, 152 hours; March he lost the entire month, 176 hours; April he lost the entire month, 176 hours; May he lost the entire month, 168 hours; June he lost the entire month, 176 hours; July he lost the entire month, 184 hours; August he lost the entire month, 168 hours; September he lost the entire month, 168 hours; [fol. 216] October he lost 96 hours; in November he lost one hour for personal reasons; December, no time lost.

Q. Now in '54?

A. In January 1954 there was no time lost; February he lost five days on account of sickness; March he lost 23 days on account of sickness; April he lost 22 days on account of sickness; May he lost five days on account of sickness; June he lost one day on account of personal; July no time lost; August two days for personal; September no time lost; October no time lost.

Q. That brings that up to November of this year, is that correct?

A. Yes, sir.

Mr. Cobb: Pass the witness.

Cross-examination.

By Mr. Gallagher:

Q. Did I understand you to say that Mr. Arnold there was limping back in 1947?

A. Yes, sir.

Q. Which foot?

A. The right one.

Q. When did that question first come up about limping, when you started to prepare for this trial, did you bring the question up or what?

A. No, sir, I didn't bring the question up.

[fol. 217] Q. Did you ever tell anybody—do you have any record in that personnel big file that you have got about him limping?

A. Not that I recall.

Q. Didn't you say that in that personnel file you included in it that which has to do with the employees?

A. Yes.

Q. Do you have a word, syllable, word or line in it about him limping?

A. Not that I recall.

Q. But you do have a great big file there on this man, don't you?

A. Yes, sir.

Q. Not one word about his physical condition, yet you as his superior have observed and watched him limping?

A. Yes, sir.

Q. And you don't know what caused it?

A. No, sir.

Q. Do you know what's wrong with him, limping back there?

A. No, sir.

Q. Did you ever ask him?

A. I didn't talk to him about it.

Q. Did you ever have the concern to ask him about it as your employee?

A. He was performing his work and I never had occasion to ask him. No, sir.

[fol. 218] Q. It was so inconsequential, yet you remembered it. Can you name another man that limped along about the same time back there, and on which foot?

A. I don't recall.

Q. Is he the only one on the railroad who limped in 1947?

A. I don't know.

Q. What was wrong?

A. I don't know.

Q. You remembered when you said he had a little finger hurt, or something back there in January of '52?

A. Yes, sir.

Q. How long did he limp back there?

A. Well as I said, I observed his walk shortly after January the 1st 1947 when I first came to this division.

Q. How long did he walk that way?

A. I don't know, ever since I was here in charge of this Division.

Q. He has walked with a limp ever since 1947 up to 1952?

A. Well he has ever since I have known him, yes, sir.

Q. How often did you see him?

A. Oh, I imagine in Lubbock possibly once a week, I wouldn't always see him because he worked the second shift part of that time.

Q. Did you know him pretty well?

A. Just as Car Inspector.

[fol. 219] Q. Were you in Slaton and he here?

A. Yes, sir.

Q. Now where was he when you first saw him limping, in Slaton or here?

A. He has been working at Lubbock.

Q. Here, huh?

A. Yes, sir.

Q. Were you here everyday?

A. No.

Q. And you saw him limp one day and then you went back to your work in Slaton, is that right, in '47?

A. I said I observed that he was limping shortly after I had seen him.

Q. And, then you came back from Slaton again and he was still limping?

A. Certainly, that was his normal way of walking.

Q. Oh, it wasn't a limp, he just walked abnormally?

A. With a limp on his right side, yes, sir.

Q. Did you ever inquire if it might affect his capabilities as a worker, that limp?

A. No, sir.

Q. Are you the only man who knows that, to your knowledge?

A. I don't think so.

Q. You made no notation of it?

A. No, I didn't make any notation of it.

[fol. 220] Q. Did he limp in 1948?

A. Yes, sir.

Q. Did he limp in—did you see him in '48?

A. Yes, sir.

Q. When did you go to California?

A. I left here on the second day of June 1954.

Q. And was he limping up to 1954?

A. Anytime I happened to see him, yes. He had a certain walk that he had and you couldn't help but notice it.

Q. Oh no? Did he have the same limp in 1954 that he had in 1947?

A. Practically so, as far as I noticed, he did.

Q. Isn't it a fact that the limp that you saw, and the only limp he ever had, occurred after he got hurt?

A. No, sir.

Q. He did limp after didn't he?

A. I imagine he did.

Q. You imagine it, don't you know?

A. I don't know.

Q. But you say he limped before?

A. Yes, sir.

Q. Just walk like he did, will you? Get down and walk like he did.

A. I can't demonstrate how a person walks. I am not an imitator.

[fol. 221] Q. Well you can walk—you can limp like he did, can't you?

A. No, sir.

Q. Have you computed your hours and days lost in terms of months?

A. Yes, sir.

Q. How many months has he been away since he has been hurt, on a conventional days work?

A. Well, for total months he was off four in '52 and nine in '53.

Q. And '54?

A. '54 he was off on account of sickness.

Q. He was off, we won't go to the cause, how much off in 1954?

A. Well, he was off five days in February, off the entire month of March, the 23 working days, he was off the entire month of April or 22 working days. He was off five days in May, he was off one day in June for personal. He was off two days in August, personal. That was the time lost in '54.

Q. That is about 15½ months total, isn't it?

A. About that.

Q. Do you have in that personnel file a report from Dr. Dunn concerning this man's condition?

A. I have a report as a quotation from Dr. Hopkins.

Q. Do you have one from Dr. Dunn of this city in which he states that this man wouldn't be able to work again?

A. Yes, sir.

[fol. 222] Q. He does state that, does he not?

A. What is that again?

Q. Do you have that report of Dr. Dunn's in that personnel file, addressed to the railroad that this man, (Mr. Gallagher reading.) "Can't I make it clear that this man will not be able to work again." Do you have that report?

A. No, I don't have that.

Mr. Gallagher: That is all.

Mr. Cobb: That's all, Mr. Fertig.

Mr. Smith: No questions.

The Court: You may step aside.

(Court recessed until 9:00 A. M. November 24th, 1954.)

JURY OUT

[fol. 223] 9:00 A. M. November 24, 1954

JURY IN

The Court: The defendant may call your next witness.

G. W. CULWELL having been first duly sworn testified on direct examination by Mr. Cobb as follows:

Q. State your name, please sir.

A. Culwell, G. W.

Q. Where do you live, Mr. Culwell?

A. Slaton.

Q. By whom are you employed?

A. Santa Fe Railway Company.

Q. That is the Panhandle and Santa Fe?

A. Panhandle and Santa Fe.

Q. How long have you been employed by the Panhandle and Santa Fe?

A. Since October of '22.

Q. Since October of 1922?

A. That's right.

Q. What are your duties at the present time?

A. Car Foreman.

Q. Now you have been with the Santa Fe a number of years?

A. Yes, sir.

Q. What work did you start out with when you started [fol. 224] with the Santa Fe?

A. As freight car apprentice.

Q. What do you mean by that?

A. Well, just general car work.

Q. Is that repair work?

A. Yes, sir.

Q. What did you go to from that type of work?

A. Well, in the latter part of 1941 I went to assistant car foreman and in the latter part of 1943 I went to car foreman.

Q. Did your duties during that time include those of car inspector?

A. Yes, sir.

Q. You have served as car inspector, is that right?

A. That's right.

Q. And car repairman?

A. Yes, sir.

Q. Do you know Mr. Arnold here?

A. Yes, sir.

Q. H. T. Arnold?

A. Yes, sir.

Q. How long have you known Mr. Arnold?

A. Well ever since I came to the Slaton Division, if I remember correctly it was in '29, 1929.

Q. Now state whether or not Mr. Arnold is under your direct supervision?

[fol. 225] A. Yes, he is.

Q. And how long has he worked under you, Mr. Culwell?

A. Well, under my direct supervision since September of 1943.

Q. During the period of time that you have known Mr. Arnold have you noticed anything out of the ordinary or peculiar about his walk?

A. Yes, sir.

Q. What did you notice?

A. Well it would indicate a slight limp.

Q. When did you first notice that?

A. Well, soon after he came to our division in 1929.

Q. Did you—did that condition, that way of walking continue right on up to 1952?

A. Yes, sir.

Q. You noticed it from time to time?

A. Yes, sir.

Q. Have you also noticed it since January 16th, 1952?

A. Yes, sir.

Q. Has it grown any worse since January——

A. Well, it doesn't seem to have.

Q. How many times a week did you have, on the average did you have an opportunity to observe Mr. Arnold?

A. Well, it varies anywhere from one to possibly three times a week.

Q. That has continued since 1943, is that correct?

[fol. 226] A. Yes, sir.

Q. Do you recall when Mr. Arnold was run over by a truck?

A. Yes, sir.

Q. Belonging to Billings' Transfer?

A. Yes, sir.

Q. When was that Mr. Culwell?

A. Well, it was the morning of the accident which was January 16th.

Q. In what year?

A. '50, I believe it was.

Q. Now was that '50, or was that a later date?

A. Well, I don't know that I understand your question.

Q. Was it during the year 1950 or was it a later date? Could you be wrong on that date?

A. I am not positive about the date, except that is the year. I do remember it being in January and on that date, it was my impression it was 1950.

Q. Were you up here at any time during that day?

A. Yes, sir.

Q. Did you see Mr. Arnold?

A. Yes, sir.

Q. Just state to the Jury, if you will, the circumstances surrounding your seeing Mr. Arnold on the date of his injury.

A. Well I was at Slaton at the time of the injury, and I was notified by the office at Slaton that he had been injured and drove to Slaton—I mean to Lubbock—and on [fol. 227] my arrival at Lubbock I contacted one of our employees and he said that Mr. Arnold had gone to the hospital for treatment, but whenever he came back from the hospital I met him at the--right near the passenger station. He was going East and I was coming West and I met him there.

Q. Was there any conversation between you and Mr. Arnold at that time?

A. Yes, sir.

Q. I asked him how serious his injury was and he stated to me that he had been informed by his doctor that there was no bones broken and there was a slight bruise and some skin knocked off of his arm.

Q. Now Mr. Culwell, do you have any records that would show the exact date that this injury happened?

A. Well, I am sure it is in his personal record.

Q. Do you have that there with you?

A. Yes, sir.

Mr. Gallagher: I would like some identification of the records before they are read into this——

The Court: All right.

Q. Now Mr. Cullwell, is that, are those the records regularly kept concerning Mr. Arnold?

A. Yes, sir.

Q. Where are they kept?

[fol. 228] A. In the master mechanic's office.

Q. Do you have access to those records, being the supervisor of Mr. Arnold?

A. Yes, sir.

Q. Are those records which are regularly kept and pertaining to Mr. Arnold?

A. Yes, sir.

Q. Will you refer to them and see when the records show the accident happened?

Mr. Gallagher: I will ask to question the witness on voir dire.

The Court: All right.

Voir dire examination.

By Mr. Gallagher:

Q. Do you personally keep those records?
A. No, sir, they are kept in the master mechanics office.
Q. Is that the office in which you work?
A. That's right.
Q. Do you know anything about bookkeeping?
A. No, sir.
Q. Do you know—do you furnish the material personally that goes into those records?
A. Part of it.
Q. You don't furnish all of it?
A. No, sir.
Q. You don't know of your own personal knowledge [fol. 229] whether that correctly represents what transpired or not?
A. Yes, sir, they do.
Q. Do you know—if you didn't make the information, do you know that personally? I said your personal knowledge.
A. Well, no, not that, that I don't make, but it is correct information concerning the man's record.
Q. You believe it to be?
A. Yes, sir.
Q. But it is furnished by some persons other than yourself and kept by other persons?
A. It is kept in the general office.
Q. All you know about it is that you have access to go in and look at it if you want to, that is all you know about it?
A. No, that isn't all I know about it. It is correct information that is compiled from time to time from different instances.
Q. You believe it to be that way?
A. Yes, sir.
Q. What you know about it is that you can go in and have access to any file on any man?
A. Under our supervision.
Q. Your real job is a car inspector foreman?
A. Car foreman.
Q. And as such, you have access to the records of the railroad?

A. Yes, sir.

Mr. Gallagher: I don't believe he is qualified to prove [fol. 230] this.

The Court: I will overrule your objection.

Mr. Gallagher: Note our exception.

Direct examination (Continued).

Q. Would you please refer to the record Mr. Culwell, and determine from that if you can the date you saw Mr. Arnold.

(Witness looking at records.)

Mr. Gallagher: Your Honor I will agree the date it happened.

The Court: I don't think there is any controversery about it.

Mr. Cobb: I don't think there is any controversery.

The Court: It may take all day.

Mr. Gallagher: Yes.

Mr. Cobb: I just wanted to—is Counsel willing to state that the testimony showed that it was the year 1952 instead of 1950?

Mr. Gallagher: I don't think there is any question.

Mr. Cobb: I just wanted to get it straight in the record.

The Court: All right. Go ahead.

Q. The testimony in this case shows that the accident happened in January of '52, instead of '50, would that be correct, Mr. Culwell?

A. Yes, sir.

[fol. 231] Q. Now at the time you came up here, did you notice a Billings' truck anywhere down near the Santa Fe station here in Lubbock?

A. Yes, sir.

Q. Where was it?

A. It was on the driveway just West of the cars there on the track on which they were placed for unloading.

Q. Was the driver of that truck there?

A. Yes, sir.

Q. Do you know who he was?

A. He introduced himself to me as Mr. Stone. I believe he said Jack Stone.

Q. Did you talk to him?
A. Yes, sir.
Q. Did you inspect the truck?
A. Well, not thoroughly, but partly.
Q. Did Mr. Stone explain to you how the accident happened?
A. Yes.
Q. Did he have any conversation with you at that time concerning the backing of the truck?
A. Well, I asked the man which direction he was going whenever the accident occurred and he said——

Mr. Gallagher: Just a moment. I will object to that as hearsay.
The Court: Sustain the objection.

Q. All right, sir, did you talk to Mr. Arnold concerning [fol. 232] how the accident happened?
A. Yes, sir.
Q. What did Mr. Arnold say?
A. He said that he was travelling in the same direction in which the truck was going evidently whenever the accident occurred.
Q. With his back to the truck?
A. Yes, sir.
Q. And did he explain to you at that time just what happened?
A. Well it seems he didn't have a thorough knowledge as to exactly what did happen, except that he didn't see the truck.
Q. And what part of his body did the truck run over, if any part?
A. He stated to me that it ran over his arm.
Q. Now Mr. Culwell, you have stated have you not that you have inspected cars of the type that were on the siding that morning?
A. Yes, sir.
Q. How long a period of time would it take to inspect and service three cars of the types that were on the siding there that morning?
A. I would say approximately 15 minutes.
Q. And would you explain to the Jury what would be

necessary and usual to be done in order to inspect those cars there?

A. To make a mechanical inspection on the outside of both—of all the cars and also an interior inspection, and [fol. 233] to see that the lights were turned out.

Q. Was it necessary to release the air on all three of the cars that were standing there that morning?

A. No, sir.

Q. Which of the cars was it necessary to release the air on?

A. The East car.

Q. The last one?

A. The last one.

Q. Would you explain to the Jury why it was not necessary to release the air on the first two cars?

A. Well they came in in passenger train service and they were to be moved out in passenger train service, and the East car, which was the third car moved in in passenger service and would be moved out in freight service.

Q. All right, sir, how many times each day is it necessary in normal business to service cars on that particular spur track, the pullman spur?

A. Well depending on what was to be done to the cars, but for the inspection one time.

Q. One time each day, is that correct?

A. Yes, sir.

Q. Is that still the situation down there?

A. Yes, sir.

Q. Now at the time you talked to Mr. Arnold did he mention any injury to his back?

[fol. 234] A. No, sir.

Q. The only injury he mentioned was what?

A. His arm.

Q. Have you seen him from time to time since this accident happened?

A. That's right.

Q. Have you asked him anything concerning his injuries?

A. Yes, sir.

Q. What would be his statement to you when you would ask him concerning his injuries?

A. Well, he would say he was getting along pretty good, no special complaints.

Q. Now, Mr. Culwell, do you know what the blue flag rule is?

A. Yes, sir.

Q. Will you just state to the Jury the application of the blue flag rule?

A. The blue flag is used for protection of the employees working on or about cars, to keep from coupling in or moving these cars while they are engaged in their work.

Q. Does that pertain to the Santa Fe locomotive coupling into cars that are being worked on?

A. That's right.

Q. Is that the only application of the blue flag rule?

A. Yes, that is all it is used for, for protection while they are working on and around cars or locomotives.

[fol. 235] Q. Are there any instructions put out by the Railway Company to its employees on safety?

A. Yes, sir.

Q. And in connection with the blue flag rule?

A. Yes, sir.

Q. Do you have any of those instructions with you?

A. Well, I have a pamphlet here that-s—form 1264, which gives general instructions for the safety of each man working, and also the use of blue flags.

Q. Did Mr. Arnold receive a set of those instructions?

A. Yes, sir.

Q. How do you know?

A. The record indicates as much, that he signed for this in—August 20th, 1950.

Q. Do you have that with you?

A. Yes, sir.

Q. And that is this particular pamphlet which you have here, is that correct?

A. Yes, sir.

Q. I will ask you to refer to the last paragraph on page 4 of those instructions, and I will ask you to read that if you will to the Jury.

A. (Witness reading.) "The Company does not require its employees to incur risks and direct themselves to exercise proper care and judgement to protect themselves."

[fol. 236] Q. That is part of the company's instructions?

A. That's right.

Q. And Mr. Arnold received those instructions?

A. Yes, sir.

Q. Now Mr. Culwell, I ask you to refer here——

Mr. Gallagher: Let me see your book. Where did you read?

A. Right here. (Indicating.)

Mr. Gallagher: Thank you.

By Mr. Cobb:

Q. I ask you to refer to Defendant's Exhibit Number D-1, will you state what that represents?

A. Well it represents the location on which the cars were standing on the tracks.

Q. Does it also show the driveway that the Billings' truck used?

A. Yes, sir.

Q. That morning, January 16th, 1952?

A. Yes, sir.

Q. Have you ever received any complaints at any time from Mr. H. T. Arnold concerning the use of that driveway by the Billings' trucks?

A. No, sir.

Mr. Cobb: Pass the witness.

Further direct examination.

By Mr. Smith:

Q. Mr. Culwell, you didn't see the Billings' truck run [fol. 237] over Mr. Arnold, did you?

A. No, sir.

Q. Do you know of anybody besides H. T. Arnold that claims they saw the truck run over Mr. Arnold?

A. No, sir.

Mr. Smith: That is all.

Cross-examination.

By Mr. Gallagher:

Q. How far is Slaton from Lubbock?
A. 16 miles.
Q. Your duties principally were performed by you at Slaton, is that a fact?
A. No, sir.
Q. Did you spend most of your time at Slaton?
A. Well, I had quite a large territory and it is all over the territory.
Q. In other words you hit Lubbock once in awhile?
A. That is my headquarters at Slaton.
Q. How many miles area does your work cover?
A. It covers from Texaco to Sweetwater Junction and from Canyon to Sweetwater Junction.
Q. Do you have employees down at Sweetwater working under you?
A. No, sir.
Q. I thought that was your territory?
A. No, I said to the Sweetwater Junction, that does not take in Sweetwater.
[fol. 238] Q. What other towns did you have employees working under you?
A. Snyder and Lubbock.
Q. And you make the rounds so to speak?
A. That's right.
Q. Now do you know what time it was that you got a message that an emergency existed down here in Lubbock concerning Mr. Arnold here?
A. No, sir.
Q. You don't remember the time you got the message?
A. No, sir.
Q. And you didn't remember the day?
A. Yes.
Q. And you didn't remember the year?
A. Well, I didn't remember exactly, no sir.
Q. All right. But you did remember he limped?
A. That's right.
Q. This rule you read, I will read it again, (Mr. Gallagher reading.) "The Company does not require em-

ployees to incur risks." Well, you wouldn't expect the company to require them to do that would you, in ordinary dealings of men?

A. No.

Q. So it appears to be unnecessary to say that, doesn't it?

A. Well, the man asked the question if we had it and I said we did.

Q. I am asking you a question now, it doesn't appear to be necessary that no company requires a man to incur [fol. 239] dangers does it?

A. It is one of their general rules.

Q. Let's see if it did require them. That passage way—this has been drawn as a representation of the—how the station looks there. Now was that ever a little walkway from the station from North to South to the West of the pullman spur track.

A. Was it ever a small walkway?

Q. Yes.

A. It was.

Q. Was it enlarged at some time in the past so as to make it wider?

A. It was.

Q. Was it enlarged for the specific purpose of using it for Billings' trucks to get the mail?

A. It was enlarged for use of trucks.

Q. Uh huh. And the limit, the width of that, from the grass there to the side of the coach, not the rail, the side of the coach, if one is standing there is how wide?

A. I couldn't tell you.

Q. Didn't you know that would be important here before you came to testify? Couldn't you have measured it?

A. Why sure I could have.

Q. Well, how wide is that Billings' truck you say that [fol. 240] you saw that was using that walkway?

A. I couldn't tell you.

Q. Don't you know how wide a truck is like that?

A. No. I never did measure one. I never did own one.

Q. Well, can't you guess, can't you give me an estimate?

A. This is not a guessing proposition.

Q. Well, I hope it isn't, but I am compelled to make it so. Can't you even estimate the width of the truck?

A. I would say it was standard width, now I don't know what standard width is.

Q. How much of your so-called walkway or driveway is left on either side between the coach if one is standing there on the grass, and if one is backing out like you said he did, how much on either side clearance?

A. I don't know.

Q. Isn't that important here?

A. Yes, but—it might be, but I can't tell you.

Q. You don't know?

A. No, that's right.

Q. Well I am just going on your rule that if a truck is coming back there like that, like you say you saw, and your men are working around these cars, whether your rule is really true here, that you didn't require your employees to subject themselves to hazards and danger. Now, what do you say?

A. It didn't say he had to be working there when the [fol. 241] truck was there.

Q. Must he go home when the truck comes?

A. No, he has got other work to do.

Q. Must he leave what he is doing when a truck arrives?

A. There is no specified time as to when these cars are to be inspected during the day.

Q. Do you want him to go out on the grass and sit down until those trucks get out of there?

A. No.

Q. Just as an ordinary human being, would you say that?

A. I stated that he had other work he could be doing while those trucks were there.

Q. Leave what he is doing and get out of the way of that truck. Is that your testimony before these gentlemen? Can you answer me?

A. I have already answered.

Q. O. K. Is your rule true then, "the company does not require its employees to incur risks"?

A. They do not.

Q. Can a man like Arnold or any other man, occupy that walkway here, or passageway, call it what you will, at the same time the truck is on it like that, and be safe?

A. He wasn't asked to perform that.

Q. My question is this, you heard my question, can he do it, be on that passageway at the same time a truck is on it?

[fol. 242] A. Yes, sir.

Q. And be safe?

A. Yes, sir, he can.

Q. Show me how?

A. By watching.

Q. By watching what?

A. To see where he is going and to see what is coming.

Q. Oh, he is not privileged, according to your instructions then to perform work on this coach here, and then leave that place of work to another part of work while there is a truck up there standing still?

A. No, sir, he can perform his work while the truck is there.

Q. Then he can leave it and go and do other work?

A. He can if he has got other work to do and wants to wait on that truck.

Q. Isn't that exactly what happened here?

A. What do you mean, left other work to come to this?

Q. He opened up an air valve on an air drum here, or bled it as you fellows say, and then while it was spewing out here he went back to the South end of the car to do other work, isn't that exactly what happened here? Isn't it?

A. What the man told me was——

Q. Isn't that what happened?

A. No, sir.

Q. That didn't happen?

[fol. 243] A. No, sir.

Q. You stake this law suit on that statement, do you?

A. Yes, sir.

Q. All right. Now, Mr. Culwell, did you make any—put any page in his personnel record that you have under your feet there, or beside you, that this man is limping?

A. No, sir, none that I know of.

Q. Wasn't that of any importance, whether he limped or whether he didn't limp?

A. No, sir, as long as he was performing his work.

Q. He was a good worker?

A. Yes, sir. I would say he was.

Q. 32 years of it, was it?

A. I don't know the date of his employment.

Q. You carried it back to 1929, that is 25 years, he was a good man wasn't he?

A. He performed his work.

Q. Was he a good man, or not, just answer it?

A. Well, he still performed his work properly.

Q. Satisfactorily?

A. In most cases.

Q. Is there a case you can tell me where he didn't perform it right?

A. Well, I could probably go through his record and tell you where he probably had gotten a reprimand or dis-
[fol. 244] cipline on different occasions.

Q. In other words, you ruled him in the conduct of his work?

A. He has been governed by the conduct of his work, yes.

Q. But so far as actually performing his work there was nothing wrong with him. He stayed in the employment didn't he?

A. Yes, sir.

Q. Now, did you say he limped in 1929?

A. Yes, sir.

Q. Which foot was it?

A. Right.

Q. Did you ever ask him about that limp?

A. Not prior to his injury.

Q. A thing that didn't call to your attention enough to ask him about it, you say you would remember that clear back 25 years?

A. Well, I think a man with any observation at all would observe a man's peculiarity or limp in his walk.

Q. Do you know anybody else in the whole Santa Fe system that limps?

A. Yes, sir.

Q. Name one of them, right now, and give me his address.

A. I don't know that I can give you his address.

Q. Now, when was the first time, with respect to this law suit, that you heard the word limp?

A. Well, I have noticed this limp every since I have [fol. 245] known the man.

Q. Have you noticed it ever since he was hurt?

A. Yes, sir.

Q. When is the first time that attorneys or a claim agent or anybody else mentioned the word limp to you in connection with this trial here?

A. I concluded that myself.

Q. Who did you tell it to, the first man that you ever told it to?

A. Well, I wouldn't say positively, but I concluded that myself after the injury.

Q. Well a lawyer has to find out what you know. When did you tell your lawyers here? Did you volunteer or did they quiz you on it?

A. I didn't tell the lawyer at all.

Q. Who did you tell?

A. Mr. Martin.

Q. The claim man?

A. Yes, sir.

Q. Did you—after this trial had started?

A. Well it has been discussed some.

Q. But to look at a man one time can you tell at once whether he limps on his right foot or his left foot?

A. Well, if you observe him closely enough you can.

Q. Does it strike you as being a bit unusual that you can [fol. 246] remember a limp of a quarter a century ago, a thing that is unimportant, and you can't remember the date you got that emergency call?

A. I told you the date we got the emergency call.

Q. 1950?

A. January 16th.

Q. 1950, you said, isn't that a little bit unusual?

A. Well, I can tell a good many people by their walk going from them. I didn't say everybody now. I said a good many people I could tell by their walk if I had been in contact with them for a number of years.

Q. In other words, you will remember me by my walk?

A. No, I didn't say that.

Q. Do you own any stock in the Railroad Company?

A. No, sir.

Q. Did I understand you to say that these coaches in

question on the morning this man got hurt were not going into freight service?

A. I said two of them were not.

Q. Did you say he did the wrong thing when he drained the air from car number 2 there?

A. He didn't drain the air from car number 2. He drained it from car number 3.

Q. Number 3 then. Did you say he did the wrong thing?

A. No, sir, I didn't.

Q. I just wanted it straight.

[fol. 247] Mr. Gallagher: That is all.

The Court: Any further questions.

Mr. Gallagher: No further questions here.

The Court: You may step aside.

Dr. C. B. Batson, having been first duly sworn testified on direct examination by Mr. Cobb as follows:

Q. State your name, please sir.

A. Dr. C. B. Batson.

Q. Where do you live Dr. Batson?

A. Lubbock, Texas.

Q. How long have you lived here?

A. About nine and a half years.

Q. Are you a medical doctor?

A. Yes, sir.

Q. Are you a graduate of any medical school?

A. University of Arkansas.

Q. When did you graduate from there?

A. 1927.

Q. Are you licensed to practice medicine in Texas.

A. Yes.

Q. Any other state?

A. Yes, Arkansas and Louisiana.

Q. Have you had any special training, doctor, to qualify [fol. 248] you to practice your profession?

A. Yes, four years of medical school, two years of hospital internship.

Q. Where did you have your internship?

A. Knoxville, Tennessee and Bogalusa, Louisiana.

Q. Have you been practicing medicine ever since you left your internship?

A. Yes, sir, since 1929.

Q. You have been practicing in Lubbock for how long?

A. Nine and a half years.

Q. Where is your office located here in Lubbock?

A. 1315 10th Street.

Q. Are you on the staff of any hospitals here in Lubbock?

A. Yes, West Texas Hospital and Methodist Memorial.

Q. In your practice, doctor, have you taken X-rays of patients?

A. Yes, sir.

Q. Do you customarily study and diagnose the X-rays of patients you have taken?

A. Yes, sir.

Q. Do you know Mr. H. T. Arnold back here?

A. Yes, sir.

Q. How long have you known him?

A. I believe since 1950.

Q. 1950. Do you keep any records of patients treated by you?

A. Yes, sir.

[fol. 249] Q. Do you have a record on Mr. H. T. Arnold?

A. Yes, sir.

Q. Do you have it with you?

A. Yes, sir.

Q. Would you state the first time you had occasion to treat Mr. Arnold?

A. (Witness looking at paper.) I first treated Mr. Arnold February 27th, 1952.

Q. That was the first treatment you ever——

A. Yes, sir.

Q. February 27th, 1952?

A. Yes, sir.

Q. What was that treatment for?

A. Well, he had some type of upper respiratory infection or something like that, bronchitis or the flu.

Q. Now, was that is 1952?

A. That was February the 27th, 1952—no, 1950.

Q. That was a respiratory trouble?

A. Yes, sir.

Q. When was the next time you treated him?

A. In March of that year—wait a minute—I better correct that, I believe my records—about that date—I believe I have that marked '52. I am sure that is not correct. I must have made a mistake on that.

Q. That entry of the respiratory trouble?

[fol. 250] A. That entry. I had seen Mr. Arnold previous to the time he was injured, but I believe I have this record marked '52. That is not correct. I am sure that is not correct.

Q. You speak of the time he was injured—on what date did you see him——

A. He was injured on January 16th, 1952.

Q. Did you see him on that date?

A. Yes, sir.

Q. What were his complaints at that time, Dr. Batson?

A. He came in complaining of multiple bruises of his shoulder and arm and forearm——

Q. Did he give you a statement——

A. —and elbow.

Q. And elbow?

A. Yes, sir.

Q. Did he give you a statement as to what had happened?

A. Yes, he did.

Q. What was that, Dr. Batson?

A. Well, his history was that he was working down at the Santa Fe Depot and a Billings' truck backed into him and knocked him down and run over his right arm, forearm.

Q. Now, doctor if you would, you state the extent of the abrasions or skinned places on him that you saw at that time?

A. Well, they were relatively minor. He had some soreness of his wrist and some of his elbow, it wasn't too [fol. 251] much. On his first visit I X-rayed his wrist. He wasn't complaining too much about his elbow at that time, and I found no fracture or broken bones or dislocations of his wrist. He was given first aid for his injury and returned to duty.

Q. Now, did you see him again?

A. Yes, I saw him again on the 17th.

Q. That was the 17th of January?

A. 17th of January 1952, again on the 19th of January 1952. At that time those abrasions and contusions were

dressed and I saw him again on January 21st, 1952. At that time he was complaining a little bit more about his elbow, and his right elbow was X-rayed at that time. There were no fractures, no broken bones, no dislocations of his elbow.

Q. Did he have any other complaints at that time?

A. Well, no, just mostly of his right arm and right wrist.

Q. Now, doctor, after you took the X-rays on January 16th and those on January 21st, did you take any other X-rays?

A. Yes. I saw Mr. Arnold again on February the 4th, on February the 6th and 8th and then again on the 12th. And on the 12th of January 1952, due to the fact that he was complaining some of his neck and his back, I took several X-rays on January 12th of his—I took——

Q. Is that January 12th or February 12th?

A. February 12th, 1952. I took complete X-rays of the entire spine at that time, including both anterior-[fol.252] posterior and lateral view of the vertebrae of his neck, his chest and his back and I did re-X-ray his hand at that time.

Q. Do you have those X-rays with you, doctor?

A. Yes, sir.

Q. I wonder if you would mind stepping down.

(Witness standing in front of view box.)

Starting with the first X-rays we will mark these as Exhibits. Start with the first one.

A. Now here is the first X-ray that was made on January 16th 1952. I believe this was made—that was made——

Mr. Cobb: In order to save time is it all right to qualify all of these X-rays.

Mr. Gallagher: Yes, I will admit them without any further statement. Just put them all in evidence, so long as you are sure of this man, that is all I care about.

A. Yes, sir.

(Defendants Exhibits Numbers D-5 through D-13, X-rays, marked for identification and offered in evidence.)

Q. These X-rays were of H. T. Arnold?

A. Yes, sir.

Q. And do they correctly portray the portions of the body which show on each X-ray?

A. Yes, sir.

Q. I hand you what is marked D-5, put that in the view box. Now doctor, just a minute, will you state to the [fol. 253] Jury what that is?

A. This is an anterior-posterior view, that means a view this way (indicating) and a lateral view of Mr. Arnold's right wrist.

Q. Do you see any abnormalities in that X-ray picture, doctor?

A. I see none, except the possibility of a small spur there of the radius.

Q. Will you explain to the Jury what you mean by a spur?

A. A spur is an excessive growth of bone. It usually occurs in people who have arthritis or sometimes it might occur irrespective of arthritis, but it usually does occur in people we will say 45 or older.

Q. Is it true that most people 45 or older do have some showing of arthritis?

A. That is correct.

Q. Do you find anything in either of those pictures besides the showing of arthritis?

A. That is all I find. I find no evidence of any fracture or broken bone or any dislocations.

Q. All right, doctor, I hand you a picture marked D-6, put that in the view box.

A. Now, that is a picture of Mr. Arnold's right elbow.

Q. Do you notice anything abnormal about that?

A. I see nothing abnormal about that. There possibly might be a small spur there on that bone, but that—out- [fol. 254] side of that I see no abnormality.

Q. Do you see any evidence of a fracture there?

A. No, no evidence of fracture. No evidence of dislocation.

Q. That was taken on——

A. January 21st, 1952.

Q. Doctor, I hand you Defendant's Exhibit Number D-7 and ask you to place that in the view box and tell the Jury what that is?

A. That is a lateral view of the vertebrae of Mr. Arnold's chest.

Q. When was that taken?

A. February 12th, 1952.

Q. Do you see any abnormalities there anywhere?

A. Yes, I do. I think I reported that. There is an abnormality of about the ninth vertebra there.

Q. You call that the ninth thoracic vertebra?

A. Ninth thoracic vertebra, yes.

Q. Now what kind of abnormality do you notice there, doctor?

A. I notice there is a compression here, this side of the vertebra there. That is a compression of the anterior portion there, the other side from where the ribs come off.

Q. Is there anything there to indicate that is due to a recent injury or to an old injury?

A. Just from the picture itself I couldn't say, but from [fol. 255] Mr. Arnold's complaints I would certainly say it was an old injury because when he came in he was not complaining of any particular localized muscular spasm in that particular portion of his chest and a recent compressive fracture of the dorsal vertebra would certainly cause much pain, and cause—he would not be able to work. He would have to stay in bed, if that had been a recent thing.

Q. In other words if he had been hurt on January 16th there in that manner he would have known about it and would have complained about it, is that right?

A. Certainly, I think he would.

Q. Now did you notice any arthritis in that picture?

A. I would say he has a little arthritis here. Taking a picture through the chest, and all the organs there, you don't get a clear picture, clear bony detail as you do in taking pictures of the neck or back where you don't have to go through so many organs.

Q. All right doctor I hand you D-8, I wish you would put that in the view box.

A. This is a picture of Mr. Arnold's vertebrae or his back, the vertebra starting at the bottom of his chest and going down to the pelvis there.

Q. Do you notice anything——

A. This is an anterior-posterior view. The only thing I see abnormal about this is the presence of arthritis which is

[fol. 256] quite marked in this vertebra and this one and this one, then you see there are some more of the spurs we are talking about. There is one there that is very prominent, here is one, this one here is not quite so prominent.

Q. Now doctor, from your experience as a doctor and your knowledge as a doctor how long would it take spurs like that to form in a normal person?

A. Well, it would be over a period of years. Certainly you wouldn't expect a bony growth that size to occur in a period of weeks or months, it would be over a period of years.

Q. Do you notice anything abnormal down in this area, down in the sacral area?

A. No, I see no abnormality of the sacro iliac junction, on either side.

Q. Doctor, I hand you D-9, I wish you would place that in the view box and will you explain to the Jury which portion of Mr. Arnold's body that is?

A. This is a lateral view of the same vertebra of his back that we just took off of the preceding film, it does show a lateral view of his coccyx, which in common terminology is called the tail bone.

Q. Do you see anything abnormal in that picture?

A. You see evidence of arthritis here. You see some narrowing of the L-5, S-1 space there which is normal in a man of Mr. Arnold's age. I wouldn't say that is an abnormal condition.

[fol. 257] Q. Now would you point to the Jury that position which you say is narrow?

A. There——

Q. Now that is between the——

A. That is the last vertebra of his spine and coccyx, or tail bone.

Q. Where it connects on the tail bone?

A. If you would pick up a group of individuals in that age group and X-ray them, you would find that same narrowing in all people of that age.

Q. Due to age and natural wear and tear, is that correct?

A. Yes, sir, relaxation and—I would like to put that film back—I would like to show, while we are showing that, that there is no displacement of any vertebra. These ver-

tebrae are all in line, there is no fracture and no displacement.

Q. In other words if there had been a fracture, due to recent injury, there would be displacement, is that correct?

A. Yes, sir.

Q. I hand you D-10, I wonder if you would place that in the view box. Which portion of Mr. Arnold's body does that portray?

A. That is an anterior-posterior view of the vertebrae of his chest that we showed you previously, a lateral view and this is an anterior-posterior view.

Q. Explain to the Jury anything abnormal you might see there.

A. We see—I see a little narrowing of that same vertebra I showed you in the lateral. It is not as clear there [fol. 258] but it shows some slight concussion there. That is the ninth vertebra.

Q. Do you see any arthritis?

A. I believe I see some spurs right in here (indicating). That does not show up as plainly in the anterior-posterior view as it does in the lateral.

Q. Doctor, I hand you D-11. I wonder if you would place that in the view box and tell us what it is?

A. This shows a lateral view of the vertebrae in Mr. Arnold's neck.

Q. Do you find anything in there that is abnormal?

A. I see there is some evidence of arthritis, there is some haziness and a little, possibly a little erosion of the vertebrae, this one and this one and possibly also this one (indicating). There is a little something there that could be a little accessory bone, or it could be possibly a chip fracture. That would be——

Q. On this——

A. On this five.

Q. That is cervical five, is that it?

A. No, I believe that is six.

Q. Six. Now doctor, this arthritis that you pointed out there, how long a period of time would you say that took for that to form?

[fol. 259] A. Well, I would say over a period of years.

Q. But you do notice this chip here or——

A. That is either—it might be a little superior—exterior bone or a chip fracture, it might be due to an arthritic spur that has been separated.

Q. Now doctor I hand you D-12, I wonder if you would place that in the view box and state what that is.

A. This is an anterior-posterior view of the cervical vertebra. I see nothing abnormal in that picture. This is——

Q. D-13, will you state what that is?

A. This is an anterior-posterior view of the cervical his right hand.

Q. Do you see any fracture there?

A. No fractures, no dislocations.

Q. Anything abnormal?

A. No, sir.

Q. Now doctor, have you seen Mr. Arnold at any time since you took these last X-ray pictures here?

A. Yes, I saw Mr. Arnold up until February the 25th. I saw him some three or four times after the X-rays were made.

Q. Has he been to see you since that time?

A. I believe not.

Q. Did you prescribe any treatment for Mr. Arnold?

A. Yes, yes, I did. I tried to give him something to relieve his discomfort. I treated him for his pain and aches and also requested that he be sent to the hospital for more [fol. 260] thorough examination and evaluation of his case.

Q. Which hospital was that?

A. The Santa Fe Hospital at Topeka, Kansas.

Q. Do you have any connection with the Santa Fe employees or the Santa Fe Railroad here in Lubbock?

A. I am the physician for the Santa Fe employees.

Q. And they report to you for treatment and examination from time to time, is that correct?

A. Yes, sir, that's right.

Mr. Cobb: Pass the witness.

Further direct examination.

By Mr. Smith:

Q. Doctor, what was your diagnosis of Mr. Arnold's condition after you took these X-rays on February 12th?

A. Well, my diagnosis was multiple contusions of his right wrist, his right elbow, and right shoulder and a sprain of his right wrist, and I believe that is all. Certainly he did have a diagnosis of chronic rheumatoid arthritis.

Q. Was he complaining there at the time you took the last X-rays about February 12th, was he then complaining about trouble in his back?

A. Yes, he was. He complained of some pain in his back; however, it seemed like that developed after—sometime after his injury.

[fol. 261] Q. He did not, as I understand, complain of back pain until after the 1st of February?

Mr. Gallagher: I wish to be as liberal and make as few objections as possible, but may I please interpose an objection to a leading question. In the examination of this witness the interests of Mr. Smith and Mr. Cobb are identical, and therefore I will ask that it be confined to the rule of direct examination and not cross-examination.

Mr. Smith: I will withdraw it.

The Court: All right.

Q. Doctor, just state please when was the first time or about when was the first time that any complaint was made to you about back pain?

A. About his back injury, back complaint?

Q. Yes.

A. I don't know whether I can answer that specifically or not. I think, of course, I have no record when he complained specifically about his back, but I would think it would have been some maybe three or four days, or a day or so before the X-rays were made.

Q. If he had been complaining of back pain when you first treated him, would you have X-rayed him?

A. I would have X-rayed him when he first came in; yes, sir, if he had had any back complaints at that time.

Q. State whether or not according to your best recollection or record, the first complaint of back pain was made [fol. 262] after the second day of February?

A. Repeat the question.

Q. State whether or not, according to your best recollection or your records the first complaint of back pain was made by Mr. Arnold to you after February 2nd?

A. About that time.

Q. Did Mr. Arnold tell you after that date and before the last X-rays were taken that he had been down to Dallas and hired some lawyers and doctors and prepared this law suit?

A. No, he didn't tell me that.

Q. Didn't tell you that. Now doctor, you mentioned a little piece of bone at the sixth cervical vertebra that you pointed out on the X-ray, I will ask you to state whether or not that would be calculated to cause any particular trouble, in the location there?

A. A little small bone, if it was disconnected bone it would not. If it was a small spur that had been broken, it would cause some temporary pain. If it was a small chip fracture, it would cause some temporary pain but it would not cause permanent pain.

Q. State whether or not that is something for which nature would compensate?

A. Yes, nature would compensate by absorbing it.

[fol. 263] Q. Now doctor, I will ask you to assume that X-rays taken of Mr. Arnold's back recently, in the early part of November of 1954, showed approximately the same amount of spurring and lipping in that back as was shown there on or about February 2nd or about the time you took your X-rays?

A. Yes, sir.

Q. Assume that, would that indicate to you that what arthritis you found in his back had been aggravated, and made to grow worse?

A. No, not the fact that the spurring and lipping were there. Of course I can see why, if a man has arthritis, and he gets an injury, he certainly might expect some, as you might expect, an aggravation of his arthritis.

Q. What I am asking you doctor is, assuming that three

years—assuming that more than two years later, or just before the trial, an X-ray picture of the back showed approximately the same showing there with regard to lipping and spurring as was shown at that time, does that indicate anything to you with reference to whether an injury received back there at the beginning had aggravated, or caused that arthritic condition to become worse?

A. No, you couldn't say that.

Q. If it appeared to be about the same in an X-ray, can you say whether or not the symptoms would be about the same?

A. Well now I don't know, those things are influenced by other things than X-ray. You know arthritis, of course, [fol. 264] is influenced by other findings than X-ray findings.

Q. If you assume that it was hypertrophic osteo-arthritis?

A. Yes.

Q. It's of the bone then?

A. That's right.

Mr. Smith: I believe that is all.

Cross-examination.

By Mr. Gallagher:

Q. Doctor Batson, that is your name isn't it?

A. Yes, sir.

Q. How old a man are you?

A. Fifty-four.

Q. Doctor, if I break my arm nature has a way of mending it, doesn't it?

A. Yes, if it is replaced in proper position.

Q. Like the old French physician said, "I may cleanse the wound and tie up the finger, but the Good Maker alone may heal it." That is true, isn't it?

A. Yes, sir.

Q. And if I break my arm, it knits together, the break, unless there is too much separation, does it not?

A. Yes, unless diseases of the body sometimes interfere with healing.

Q. And if there be a separation of the shafts of the bone,

[fol. 265] they will even attempt to bridge by spurring won't they? Spurring together?

A. I don't believe you would call that spurring.

Q. Just throwing down new bone?

A. Throwing down new bone and fibrous tissues.

Q. And that is a calcium deposit, isn't it?

A. Yes, you get calcium deposit there finally.

Q. In other words, if you injure a bone, nature attempts to throw down, and does throw down, doesn't it, calcium to protect it?

A. Well calcium is for the purpose of strength you know.

Q. It does that, well it does throw down bone, doesn't it?

A. Yes.

Q. And so if you injure a bone like here—could I ask you to step down here—(Witness standing in front of view box) and then, if you injured the margin of one of those bones, just like a fractured bone, and nature throws down those deposits, it would have the same appearance as if it were arthritis, wouldn't it?

A. I wouldn't think so.

Q. Well, they would both be white wouldn't they?

A. Yes, but there's a difference in the shape, and so forth.

Q. Well, how long does it take to knit a bone? Suppose I broke that second bone in my index finger, and there was no separation, how long would it take to heal, six weeks?

[fol. 266] A. No, in your small bones that way it would probably heal in two or three weeks. If it was a big bone in your leg, it would probably take two or three months.

Q. I am talking about this finger, please sir.

A. It would probably heal in about three weeks.

Q. And it would take the putting down of new bone or calcium, that is what bone is, a new bone to knit that together, wouldn't it?

A. Yes, sir.

Q. And so instead of putting that bone there in my finger, if you put it right there where it was bruised, it would have the same physical appearance, wouldn't it?

A. I don't believe it would throw it down if it was bruised. It might if it was broken.

Q. Well if it was jammed together, break the border?

A. Well, if it breaks I would say yes.

Q. Let me ask you this question, please sir, the bones of the bodies of the vertebrae, like that (indicating), they are not firm bones like the bones in my arm, are they?

A. No, sir.

Q. They are cancellous bones, aren't they?

A. Cancellous bones, that is right.

Q. That is spongy bone, isn't it?

A. Yes, sir.

Q. And so your row of bodies of the vertebrae is like a row of spools, taken as a rough example, if I hit the ones [fol. 267] on this end, the spools or marble on the other end will fling itself out, won't it? We remember that in school, don't we?

A. Yes, sir.

Q. And therefore everyone of those bones, when a man takes a good lunge down is jammed together, or compressed aren't they?

A. Yes, they are protected, however.

Q. Yes, they have a little cartilege in there. Now when they do, they are spongy and soft, would it be unreasonable to say that the border of that vertebra is damaged and new bone is thrown down?

A. It wouldn't be unreasonable, but you wouldn't think so unless you had some concrete evidence of it.

Q. Well, let's put the concrete evidence, I am glad you said that, doctor, if you see the same amount as you are testifying, in 1954, nearly 1955 that you see in 1952, and it isn't growing any, then would it be unreasonable to say that it is injury and not arthritis at all? Will you answer?

A. I don't know whether I got the question clear or not. If you find identically the same bony formation in '54 or '55, which I have not seen. I have not seen any picture since '52, but if you found the same bony formation in '54 or '55 that you found in '52, would you say the man had an injury or arthritis?

Q. An injury that produced the little building up of bone there or whether arthritis produced it?

[fol. 268] A. Well you are presuming something that I haven't seen.

Q. Well just take for granted that what I say is true. I believe it is true.

A. I believe if you found identically the same findings in '55 that you found in '52—now, I don't know whether you could call it an injury or not, let me say this, I will say if a man had arthritis and it is progressive, then you should find, certainly you should find some additional changes, a little increase in his arthritic spurs, etc., if that is what you are trying to bring out, as time goes on it would be a little bit more.

Q. In other words, arthritis is a progressive disease, isn't it?

A. Progressive disease, that is correct.

Q. It never gets better and usually gets worse?

A. Yes, sir.

Q. Now, take the other way around, suppose he had latent arthritis before he got hurt, isn't it true doctor that he may have arthritis and never know it, in a latent form?

A. Yes, I think that is true.

Q. Would it be also true that whenever you have arthritis in a latent form and then have an injury on top of it, contusions like you say, jarring, changing the continuity that it may then flare up and become active?

A. That is possible. (Witness taking witness stand.)

Q. Doctor, as good as the medical profession is, it does [fol. 269] not know the cause of arthritis does it?

A. The specific cause of arthritis is not known that is true.

Q. And it does not know, does it, a cure for it?

A. There is no cure.

Q. That is an awful lot not to know about a disease isn't it?

A. Well, I don't know. We are not alone in arthritis about that being in ignorance, and being in the dark.

Q. That is right. But the tendency, if it be arthritis that he had before hand, and this bears it out, it may spread all over his backbone? Right?

A. If he has arthritis and gets an injury it may cause an aggravation of his arthritis.

Q. And it may spread over his backbone?

A. Well if it was all over his backbone before, yes it might. I think it was.

Q. And it may just ossify the whole backbone, couldn't it?

A. I doubt that. That is a little bit—arthritis is—that's a little bit different type of arthritis. This man has rheumatoid, and if he gets osteo and then you can get that ossification and ankylosis. I don't think Mr. Arnold would ever get an ankylosis of his spine, no.

Q. He will never get any better from it, will he?

A. I don't think so, except maybe little periods of quietness.

Q. Are you acquainted with the book of Spurling and Bradford on intervertebral discs?

[fol. 270] A. No, sir, I believe not.

Q. Would you like to just scan it for a second, any part of it, particularly where I have it marked? (Witness looking at book.)

Doctor Spurling is the one that went to Germany to treat General Patton, did you know that?

Mr. Cobb: Now, if the Court please——

The Court: Let's don't go into that.

Mr. Cobb: If it please the Court, we have let Mr. Gallagher go a long way, but he is not testifying.

A. I see the book is published in '41, revised in '45 and '47 and it might be a little obsolete, I am not an orthopedic. I do general practice.

Q. Let me ask you one thing, you made reference to—come down, if I may ask you to—(witness standing in front of view box). You made a reference that that was normal (indicating).

A. I say that is normal in a man of Mr. Arnold's age.

Q. Let me ask you this, if you would have X-rayed me this morning would you guarantee that I have the same depression down here that he has got?

A. You know a doctor doesn't guarantee. That's Sears & Roebuck. We don't guarantee.

Q. Well, do you believe that I would have?

A. I believe if we were to X-ray you, I believe we would find a narrowing of that vertebrae, because I think you are [fol. 271] past forty-five.

Q. I am sixty-one.

A. Well I think you would find it there.

Q. Doctor, I will ask you to look at that diagram, as

drawn, and see if that represents about the correct spacings——

Mr. Smith: Now, if the Court please we are going to object to any further references to this because the doctor says he is not acquainted with it. It is not admissible and it is purely hearsay.

Q. I will ask you if this diagram is about normal, so you can look at it?

The Court: I will overrule your objection.

Mr. Smith: Note our exception.

A. Well, it looks fairly normal, however, it appears to me there is a slight narrowing of that space there.

The Court: That is not in evidence, Mr. Gallagher.

Mr. Gallagher: The diagram, I just wanted to show——

The Court: Well, let's get it in evidence.

Mr. Gallagher: I can't offer the book.

Q. I will ask it this way then. I will ask you whether or not there is not greater narrowing on the back portion of that vertebra than there is in the diagram in the book there.

A. That is true.

Q. And you may say within the range of normal, if it were up there a quarter of an inch higher normally, and then it is jammed down that far it would produce symp-
[fol. 272] toms, wouldn't it?

A. If it had been—if it had been up higher and been jammed down, certainly it would produce symptoms, but I have no reason to believe that it was up higher. I think it is in normal position here. I think if it had been up higher and had been jammed down, which is the supposition, it would cause symptoms.

Q. Is it likewise a supposition that every man must have, when he gets a certain age, must have a vertebra down there?

A. Well, of course those things are based on the general law of averages. The exception makes the rule in your individual case, I would think so, of course you might be the exception, you might be the rare exception but taking the general law of average you will find some narrowing.

Q. Whenever you find—you say the ninth, without going too much over the X-rays, in the interest of time when you have the ninth dorsal or thoracic vertebra wedge shaped, which all agree is wedge shaped, and that in the center of his back, the ninth——

A. Yes.

Q. —and a man is hit from the back with a truck hard, is knocked 12 feet and forward in some sort of a jackknifed position that is the area that gets the impact of the force isn't it?

A. It is possible that a man could be hit and knocked [fol. 273] 12 feet in a jackknifed position he might get a compressed fracture of the vertebra certainly.

Q. Right there where that is?

A. Well not that particular place, but he might get a compressed fracture of any of his vertebrae.

Q. Well that is where the support—your spinal column has a double curve, doesn't it?

A. Yes, sir.

Q. And that break or compression is in the convexity of the first curve?

A. Yes.

Q. And that is where the force would be transmitted downward hardest, isn't that right?

A. Very possibly yes, I think so.

Q. And you may expect it right where it is, right?

A. Now I don't know whether I would—I am familiar enough to answer that or not. Offhand, it would just be my opinion, and I have no authority to base it on, offhand I believe in your injuries of that type, I think statistics will prove that more often it is the lumbar vertebra that has your compressed fracture, in an injury of that type rather than the chest. The chest is a little better protected.

Q. Well, you do have it down there at the fifth——

A. Yes.

Q. —right where you mentioned there.

[fol. 274] A. I beg your pardon?

Q. It is down there at the fifth lumbar vertebra and possibly the sacrum, in the back portion, right where you mentioned you would expect it?

A. Well, I believe the fifth, maybe the fourth and the third may be the ones more commonly injured.

Q. Yes, sir, he has got it there in the fifth, is down there in the fifth, isn't it?

A. He has got a narrowing of the fifth.

Q. Well, from whatever cause, speculate as you may, from whatever cause it is there, isn't it?

A. Yes.

Q. Now doctor, you, whether it be arthritis aggravated —with injury on top of it, and plus the bones we have seen mashed together and otherwise, this man you don't believe should labor, do you, involving physical exertion?

A. Well now I haven't seen this man in two years so I couldn't answer whether he is able to work or not now. I think, as far as I am concerned, I thought he was able to work when I sent him to the hospital, but I like to give a man the benefit of the doubt and I thought someone else might should see him, so I sent him out there, but I haven't seen him so I don't know whether he is able to work or not.

Q. Is it part of your information that this man has been in and out of the hospital for a total of almost a year and a [fol. 275] half in the last two years and eleven months?

A. Well, yes, I had heard that he had been in and out of the hospital.

Q. And has it been part of your information that he would go and get the therapeutic measures of treatment up there at Topeka, Kansas, and come down and get along pretty well for a few days and then go down, down, down and have to do it again. Has that been part of your information?

A. Well, I certainly have not followed Mr. Arnold. I did question some of his follow-up progress in the last day or so, but I really, to tell the truth about it, I didn't know this until I inquired about it last week, that he had had this trouble, because I had not seen him since February the 20th.

Q. If he has the arthritis which you first indicated he might have, and then you start to labor with arthritis, active exercise irritates arthritis doesn't it?

A. Well possibly so. Many arthritics do work though.

Q. It doesn't help their condition any does it?

A. I would say no, it certainly does not help.

Q. In fact, it hurts them doesn't it?

A. I don't know whether it hurts them or not, I think that depends on the degree of the arthritis. I think an arthritic person, when they do labor, they are going to be a little stiff, and they are going to complain when they get out and exercise. I don't know over all, and through [fol. 276] a period of time whether it hurts them much or not. If they take excessive exercise certainly they are going to complain of pain and stiffness.

Q. And arthritis, you wouldn't hesitate to say, would you, that arthritis is one of the most painful things there is?

A. No, I wouldn't say that it was the most painful thing.

Q. Well, it is pretty painful, I will put it that way.

A. Certainly it is very painful, in certain cases. Some cases are not so painful, others have a terrific amount of pain.

Q. Now doctor suppose a person—have you ever known, in your work, that I can—that a man gets hurt, and hurts his back, and the symptoms will not show up immediately, but will a little later on?

A. I think it could possibly be so, but it certainly would be out of the ordinary. We would expect symptoms to develop within a matter of hours or a day or so at least.

Q. Or even a month?

A. I don't think it would wait a month.

Q. You won't say it can't develop in a month?

A. I don't think—for instance just referring back to this compressed vertebra in the ninth thoracic vertebra, I think it has been my experience that if a man had a compressed fracture, he is awfully sore. He has muscle spasms and is usually confined to his bed a few days with a compressed [fol. 277] fracture, due to associated muscle spasm. I doubt that there would be a delay of—in the symptoms showing up in the type injury—in an injury of that type.

Q. With that ninth thoracic vertebra, if that is of recent origin, taking your own findings, retract what you say, it is of recent origin, if he got it when the truck hit him, a man should not work in that condition should he?

A. Well, he shouldn't work, no, unless the thing is braced. I know these orthopedic men will go ahead and let a man continue working with a compressed vertebra, but they fit him with a rigid brace.

Q. This man is wearing a brace, *Mr. Arnold, isn't he?*
A. I don't know.
Q. Now whatever—that ninth thoracic vertebra is going to stay the way it is?
A. It is permanent.
Q. It is permanent?
A. Yes, sir, that's right.
Q. And the bone under the neck is going to stay the way it is?
A. Yes, sir.
Q. Now we get down to the disputed part, like you say, of the fifth lumbar vertebra, it is down there and nothing is going to raise it up, isn't that right?
A. That is true. Unless he has surgery. They wouldn't raise it up then, they might stabilize it where it wouldn't move.
[fol. 278] Q. Might fuse it?
A. That position is permanent.
Q. Now doctor, you understand in coming to Court and examining the patient for the railroad company you, of course, have the perfect right to come into court and give your testimony and also a perfect right to make charges for your services. You understand that, don't you?
A. Yes, sir.

Mr. Gallagher: Thank you very much.

Redirect examination.

By Mr. Cobb:

Q. Dr. Batson, would you explain to the Jury what you find between these vertebrae in his neck and in the back, that space there on the X-ray that shows dark?
A. You mean the open space?
Q. The open space, yes, sir?
A. Well that open space between the vertebra is filled with cartilege which is nature's cushion there, to protect—it will serve several purposes of course, it serves to protect the vertebrae from injury. It serves as a means where the vertebrae receive their blood and nerve supply and it also makes the spinal column flexible where it will bend, not rigid.

Q. Doctor, is that space the same between all vertebrae in a normal back?

A. Fairly well so. I think there is some, maybe some slight narrowing in the neck. I don't believe ordinarily [fol. 279] the neck vertebrae are quite so widely separated as they are in the chest and back.

Q. Does a man's age have anything to do with that space you see there between the vertebrae?

A. Certainly so. As we grow older there is a shrinkage and settling down of this cartilaginous tissue and there is a narrowing of the spaces as time goes by.

Mr. Cobb: Pass the witness.

The Court: Any further questions.

Mr. Gallagher: Thank you, doctor.

Mr. Smith: I have no further questions.

The Court: You may step aside. You may proceed.

Mr. Cobb: If the Court please, we have here the Deposition of Dr. W. M. Delaney, Topeka, Kansas, taken under waiver of commission which has been filed among the papers of the case. The direct interrogatories being propounded by Panhandle and Santa Fe Railway Company. At this time, if Mr. Smith would help me I would like to read this to the Jury.

The Court: All right. Go ahead.

(Interrogatories read by Mr. Cobb, answers to Interrogatories read by Mr. Smith.)

"Number 1: Please state your name, age and present residence?

Answer: William Morgan Delaney, 38 years of age, residing at 4212 West Sixth Street, Topeka, Kansas.

[fol. 280] Number 2: Do you hold a M. D. degree? If so, please state what schooling or other training you have received preparatory to the practice of your profession.

Answer: Yes. Since graduation from medical school in 1940 I have had one year of rotating internship, one year of residency in internal medicine, 4½ years active duty with the Navy in World War II, 3 years residency in surgery at St. Clare's Hospital in New York City, including one year in post graduate surgery at the Bellevue, New York School of Medicine, and 1 year in association

with Herbert H. Schoenfeld in Washington, D. C. followed by over one year active duty with the U. S. Navy during the Korean emergency, during which time I was specializing in orthopedic surgery, and one year as an assistant in orthopedics at the Kennedy Veterans Hospital in Memphis, Tennessee.

Number 3: Are you licensed to practice medicine? If so, in what state or states are you licensed?

Answer: Yes. Virginia, New York, Kansas, Florida and District of Columbia.

Number 4: Where do you maintain your offices at this time?

Answer: Sixth and Madison, Topeka, Kansas.

Number 5: Are you connected with or on the staff of any hospital at this time?

Answer: Yes. The AT&SF Hospital in Topeka, Kansas, St. Francis Hospital in Topeka, Kansas, Children's Hospital in Washington, D. C., Emery Hospital, Georgetown University Hospital, George Washington University Hospital, Garfield Memorial Hospital, Arlington Hospital, and Alexandria Hospital staffs.

[fol. 281]

Number 6: Do you specialize in any one particular field of medicine? If so, state such field.

Answer: Yes. General and orthopedic surgery.

Number 7: Are you connected in any manner with the Santa Fe Employees Hospital in Topeka, Kansas? If so, please state the connection.

Answer: Yes. Chief of Surgery at the AT&SF Hospital, Topeka, Kansas.

Number 8: Have you at any time examined H. T. Arnold of Lubbock, Texas?

Answer: Yes. The date was April 9, 1954.

Number 9: If you state that you have examined H. T. Arnold of Lubbock, Texas, please give the date and state in what connection your examination was made.

Answer: April 9, 1954. I examined him at the request of Dr. O. L. Hanson, in the capacity of consultant.

Number 10: Please describe in detail the nature of the examination or examinations that you made of H. T. Arnold?

Answer: The examination of H. T. Arnold on April 9, 1954, was in the nature of a complete orthopedic exam-

ination, with special reference to complaints referrable to the patient's back.

[fol. 282] Number 11: Did your examination include X-ray pictures?

Answer: My examination included the review of X-ray pictures which had been taken on previous admissions.

Number 12: If X-ray pictures were made, please state whether they were made under your direction and supervision?

Answer: These X-ray pictures of the patient's back were not made under my immediate direction and supervision.

Number 13: If you have stated that X-ray pictures were made, please state whether you made a study thereof.

Answer: I did make a study of the X-ray films which had been taken on previous occasions."

Mr. Cobb: At this time we refer to the answer to Cross Interrogatory Number 1, as propounded by Billings.

(Interrogatories read by Mr. Cobb, answers read by Mr. Smith.)

"Cross Interrogatory Number 1: If in answer to direct interrogatory number 13 you state that you did study the X-ray pictures that were made by you or under your supervision, please state whether or not these X-ray pictures faithfully portrayed that portion of the anatomy of H. T. Arnold that they purport to portray.

Answer to Cross-Interrogatory Number 1: These X-ray films were not made by me and were not made under my immediate supervision; however, review of these films does show that they faithfully portray that portion of the anatomy of H. T. Arnold that they purport to portray."

[fol. 283] Mr. Cobb: Now refer back to Number 14.

"Direct Interrogatory Number 14: Do you normally study and interpret X-ray pictures made of persons whom you examine?

Answer: I routinely study and interpret X-rays pictures of persons whom I examine.

Direct Interrogatory Number 15: If such X-ray pictures are available to you at this time, we ask that you please hand the same to the official taking this deposition, who will mark them as exhibits and attach them hereto as a part of this deposition."

Mr. Cobb: Is there an answer to that question?

Mr. Smith: This number 15 seems to be an answer something about history. Did you read question number 15? I will read the answer to number 15.

Mr. Cobb: Number 15 as stated here was really not a question. At this time we offer the X-ray pictures as attached to the Deposition.

The Court: Any objections, gentlemen.

Mr. Gallagher: No.

(X-rays offered in evidence as Deposition Exhibit.)

Mr. Cobb: (Reading.) "Number 16. Did you take a history from H. T. Arnold at the time of your examination? If so, please state such history in detail.

Answer: No specific history was taken at the time of this examination, but the history which had been taken previously was reviewed. The original history taken by Dr. [fol. 284] O. S. Proctor, a member of the surgical staff of the AT&SF Hospital on 3 March 1952 was basically as follows: On Jan. 16, 1952, at 9:15 A. M. was walking near a baggage car while at work and got hit in the back by a truck which was backing up. Was knocked about 12 feet and landed on his right elbow and shoulder and both knees. Went to Dr. Batson at Lubbock, who X-rayed right forearm but could find no fracture. Did not work that day but has worked every day since. Seems he came here at instance of his superintendent, who talked to the doctor and ordered him sent to the Topeka Hospital. Says that his back hurts come in the cervical region and also in the lower lumbar region, especially when stooping to one side, as in inspecting car boxes. Pounding with hammer hurts his right hand in the region of the first metacarpal near the base.

Direct Interrogatory Number 17: Did such history include a statement from Mr. Arnold to the effect that injuries were received at Lubbock, Texas, on or about the 16th day of January, 1952, when Mr. Arnold was knocked down by a moving truck?

Answer: The history as taken by Dr. O. S. Proctor did include a statement from Mr. Arnold to the effect that injuries were received at Lubbock, Texas, on or about Jan-

uary 16, 1952, when Mr. Arnold was knocked down by a moving truck.

Direct Interrogatory Number 18: What were H. T. Arnold's complaints at the time you first saw him?

[fol. 285] Answer: Persistence of back complaints, which he attributed to his old injury.

Direct Interrogatory Number 19: Doctor, please state, basing your testimony on your findings, both subjective and objective, your diagnosis of the condition of H. T. Arnold at the time you have stated that you saw him professionally?

Answer: At the time I saw him professionally on the 9th of April 1954, it was my impression that Mr. Arnold was suffering from (1) osteo-arthritis of the spine, lumbar region; (2) postural deformities; and (3) chronic back strain super-imposed upon the above two conditions.

Direct Interrogatory Number 20: If you have seen H. T. Arnold more than one time professionally, please state what later diagnosis, if any, you made?

Answer: I saw Mr. Arnold several times following this consultation visit in a professional capacity, but there was no change in diagnosis made.

Direct Interrogatory Number 21: If you have stated that X-ray pictures were taken of H. T. Arnold, please state the various portions of the body of H. T. Arnold which the X-ray pictures revealed, and identify such portions by referring to the X-ray pictures by exhibit number.

Answer: (a) Films on March 3, 1952 were taken of the lumbar dorsal spine and the pelvis, and are Exhibits 1 to 4 inclusive; (*a*) X-rays of the right hand taken on March 3, 1952, are Exhibits 5 and 6; (c) X-rays on Apr.. 22, 1952, [fol. 286] of the lumbo-dorsal spine and pelvis are Exhibits 7, 8, 9 and 10; (d) X-rays on April 22, 1952, of the cervical spine and upper dorsal spine are Exhibits 11 to 14, inclusive; (e) X-rays taken on April 22, 1952, of the right hand are Exhibits 15 and 16; X-rays taken on February 27, 1953, of the cervical spine, are Exhibits 17, 18, 19; (g) X-rays taken on the 27th of February, 1953, of the lumbo-dorsal spine and pelvis are Exhibits 20 to 27, inclusive.

Direct Interrogatory Number 22: If you have identified

X-ray pictures of the cervical spine of H. T. Arnold, please state what abnormalities you found in his cervical spine?

Answer: X-rays of the cervical spine showed the presence of minimal arthritic changes involving the vertebrae.

Direct Interrogatory Number 23: Did you find any evidence of osteoarthritis in Mr. Arnold's cervical spine?

Answer: Yes, as stated above.

Direct Interrogatory No. 24: If you have answered that you did find evidence of osteoarthritis, in your opinion, how long has such condition existed?

Answer: In view of the minimal evidence of osteoarthritis to be seen in the films of the cervical spine, in my opinion this condition has not existed for any long period of time. The exact length of time cannot be given.

Direct Interrogatory Number 25: If you have identified X-ray pictures of the dorsal spine of H. T. Arnold, please state what abnormalities you found in his dorsal spine?

[fol. 287] Answer: No abnormalities other than minimal arthritic changes involving the vertebrae observed on inspection of the films of the dorsal spine.

Direct Interrogatory No. 26: Did you find any evidence of osteoarthritis in Mr. Arnold's dorsal spine?

Answer: Yes, as mentioned in the answer to 25.

Direct Interrogatory No. 27: If you have answered that you did find evidence of osteoarthritis, in your opinion, how long has such condition existed?

Answer: The osteoarthritis, as shown by the film of the dorsal spine of Mr. Arnold, apparently is of a longer duration than the arthritis in the cervical spine, and I would estimate that this condition had existed for several years previous to the taking of the films in March of 1952.

Direct Interrogatory Number 28: If you have identified X-ray pictures of the lumbar spine of H. T. Arnold, please state what abnormalities you found in his lumbar spine?

Answer: Other than showing the presence of moderate osteoarthritis involving the bodies of the second and third lumbar vertebrae, no abnormalities were found to be present in the X-rays of the lumbar spine taken in March of 1952.

Direct Interrogatory Number 29: Did you find any evidence of osteoarthritis in Mr. Arnold's lumbar spine?

Answer: Yes, as mentioned above.

Direct Interrogatory Number 30: If you have answered that you did find evidence of osteoarthritis, in your opin-
[fol. 288] ion, how long has such condition existed?

Answer: From the degree of arthritis present in these two vertebrae, in my opinion this condition has existed for a number of years previous to the taking of the films in March of 1952.

Direct Interrogatory Number 31: In your opinion, Doctor, and from your examination, state whether or not H. T. Arnold had a herniated or ruptured disc in his spinal area?

Answer: In my opinion, based upon my examination of H. T. Arnold and a review of the films taken of his spine, I do not feel that a herniated or ruptured disc existed at the time of the examination on April 9, 1954.

Direct Interrogatory Number 32: Did you recommend any treatment for H. T. Arnold at the time you last saw him? If so, please state what treat ,ent was recommended.

Answer: Yes. I recommended that he have a continuance of the conservative measures which had been instituted in the past, consisting ' inly of a hard bed, postural exercises, together with abc minal and back strengthening exercise."

Mr, Cobb: Do you desire at this time to introduce these cross interrogatories?

Mr. Smith: Yes, just go ahead and read the next three.

Mr. Cobb: This is cross interrogatory number 2, cross interrogatory number 1 has already been read.

[fol. 289] (Mr. Cobb reading Cross Interrogatories, Mr. Smith reading answers to Cross Interrogatories.)

"Cross Interrogatory Number 2: Please state whether or not you gave H. T. Arnold any treatment, and if you say you did please state just what treatment you gave H. T. Arnold and over what period of time.

Answer to Cross Interrogatory Number 2: I recommended that Mr. Arnold continue the conservative measures which had been instituted previously in the form of a hard mattress at night time, improvement of posture, and abdominal and back strengthening exercises. Following my examination on April 9, 1954, the patient remained in the hospital only until April 14, 1954, and was only under my

immediate supervision for that period of time; however, on his three previous admissions he was under the care of other members of the surgical staff who are directly responsible to me as Chief of Surgery.

Cross Interrogatory Number 3: When did you last see H. T. Arnold professionally?

Answer: I last saw Mr. Arnold professionally during his admission in April of 1954.

Cross Interrogatory Number 4: Please describe the physical condition of H. T. Arnold on the last occasion when you saw or treated him.

Answer: At the time I last saw Mr. Arnold in April of 1954, it was my feeling that he was suffering from (1) osteoarthritis of the spine of the lumbar region; (2) pos-
[fol. 290] tural deformities or abnormalities; and (3) chronic back strain."

Mr. Gallagher: These are Cross Interrogatories to be propounded to Dr. W. M. Delaney.

(Mr. Gallagher reading Cross Interrogatories, Mr. Bean reading answers to Cross Interrogatories.)

"Cross Interrogatory Number 1: Doctor, you know that the Plaintiff, H. T. Arnold, has worked for the Panhandle & Santa Fe Railway Company since 1922, don't you?

Answer to Cross Interrogatory Number 1: Yes. From a review of the hospital records, the form 790 Standard of the AT&SF Hospital Association shows that he has been employed by the Santa Fe Railroad since August 11, 1922.

Cross Interrogatory Number 2: You received history that he was injured while working for this same railroad company January 16, 1952, didn't you?

Answer to Cross Interrogatory Number 2: Yes.

Cross Interrogatory Number 3: Mr. Arnold was confined to the hospital in Topeka, on four different occasions following his injury, wasn't he?

Answer to Cross Interrogatory Number 3: Yes.

Cross Interrogatory Number 4: When you first examined him he gave history of his back hurting in the cervical and lower lumbar areas, didn't he?

Answer to Cross Interrogatory Number 4: At the time of his last admission to the hospital in April, 1954, his

[fol. 291] complaints were referable to his lower back and to the region of his shoulders, as mentioned by Dr. O. L. Hanson in his history at the time of the last admission.

Cross Interrogatory Number 5: Your examination revealed distress over upper sacrum on extension and flexion of the lumbar spine, didn't it?

Answer to Cross Interrogatory Number 5: At the time of my examination there was evidence of flexion of the lumbo-dorsal spine through a good range. Extension of the lumbo-dorsal spine limited, with pain referable to the lower lumbar region.

Cross Interrogatory Number 6: Did the X-ray pictures as examined by you of Mr. Arnold show hypertrophic changes of the vertebral bodies?

Answer to Cross Interrogatory Number 6: Yes.

Cross Interrogatory Number 7: Did the X-ray pictures as examined by you of Mr. Arnold show arthritic changes of the sacro illiac articulations?

Answer to Cross Interrogatory Number 7: No. The prominent arthritic changes in the lumbar sacral spine were localized to the bodies of L2 and L3 with no special involvement of the sacroiliac articulations.

Cross Interrogatory Number 8: Did the X-rays of the right hand show fracture of the middle finger with fragment of bone pulled loose from the anterior proximal [fol. 292] aspect of the middle phalanx.

Answer to Cross Interrogatory Number 8: X-rays of the right hand did show a fragment of bone pulled loose from the anterior proximal aspect of the middle phalanx.

Cross Interrogatory Number 9: When Mr. Arnold was discharged from the hospital on March 5, 1952, didn't you make the diagnosis of "brusied back and arm"?

Answer to Cross Interrogatory Number 9: When Mr. Arnold was discharged from the hospital on March 5, 1952, the diagnosis of bruised back and arm was made by Dr. Oscar S. Proctor, a member of the surgical staff of the AT&SF Hospital in Topeka, as shown by a review of the hospital records.

Cross Interrogatory Number 10: He was readmitted to the hospital on April 22, 1952, with complaint of pain in the cervical, upper dorsal and lower back region, wasn't he?

Answer to Cross Interrogatory Number 10: From a re-

view of the hospital records he was admitted April 22, 1952, with complaints referrable to the cervical, upper dorsal and lower back regions.

Cross Interrogatory Number 11: You found limitation on rotation of the neck, didn't you?

Answer to Cross Interrogatory Number 11: I did not examine the patient during the admission in April, 1952, but according to the hospital records Dr. Frank Moore did find evidence of limitation on rotation of the cervical [fol. 293] spine to the right and left.

Cross Interrogatory Number 12: You found tenderness to percussion over the right sacroiliac region didn't you?

Answer to Cross Interrogatory Number 12: I did not examine Mr. Arnold at the time of the admission in April of 1952, but according to the hospital records Dr. Frank Moore did find tenderness to percussion over the right sacroiliac region.

Cross Interrogatory Number 13: During his treatment in the hospital there was continued evidence of injury, wasn't there?

Answer to Cross Interrogatory Number 13: During his treatment in the hospital the patient's various complaints showed considerable improvement, and a discharge note on the 11th of July by Dr. Frank Moore, as shown in the hospital record, stated that physiotherapy had produced a considerable loosening up of his stiffness, and there was no limitation of the neck at that time except on extreme rotation to the right.

Cross Interrogatory Number 14: During all of his confinement periods in Topeka, there was continued evidence of arthritis present, wasn't there?

Answer to Cross Interrogatory Number 14: Yes.

Cross Interrogatory Number 15: When he was discharged from the hospital on July 12, 1954, a diagnosis of "hypertrophic arthritis and back injury" was made, wasn't it?

[fol. 294] Answer to Cross Interrogatory Number 15: When he was discharged from the hospital on July 12, 1952, a diagnosis of hypertrophic arthritis and back injury was made, according to the hospital records.

Cross Interrogatory Number 16: You diagnosed his condition as traumatic arthritis, didn't you?

Answer to Cross Interrogatory Number 16: I diagnosed his condition as osteoarthritis involving particularly the lumbar spine.

Cross Interrogatory Number 17: During his last confinement to the hospital he was still complaining of pain in the back, wasn't he?

Answer to Cross Interrogatory Number 17: Yes.

Cross Interrogatory Number 18: When you last saw him he was suffering from arthritis, postural deformities, and back strain, wasn't he?

Answer to Cross Interrogatory Number 18: In my opinion he was suffering from osteoarthritis, postural deformities and back strain.

Cross Interrogatory Number 19: When he was released from the hospital the last time you recommended reinstitution of the exercises which the patient was taught when admitted to the hospital after the injury in 1952, didn't you?

Answer to Cross Interrogatory Number 19: I recommended that he improve his posture, and that he take abdominal and back strengthening exercises as well as to [fol. 295] continue sleeping on a hard bed.

Cross Interrogatory Number 20: If you have a lateral X-ray before you of the 10th dorsal vertebra please look at it and state whether or not it is wedge shaped.

Answer to Cross Interrogatory Number 20: There is a slight wedging of the anterior aspect of this vertebral body, as shown by Exhibit 4.

Cross Interrogatory Number 21: Mr. Arnold first came to the hospital for treatment as an injured man, didn't he?

Answer to Cross Interrogatory Number 21: The form 790 Standard of the AT&SF Hospital Association, signed by C. B. Batson, MD, stated that he was suffering from injuries of his back and right hand, and recommended examination at the Topeka Hospital.

Cross Interrogatory Number 22: He was disabled at that time, wasn't he?

Answer to Cross Interrogatory Number 22: From a review of the records, Mr. Arnold was admitted to the hospital March 2, 1952, and remained in the hospital until March 5, 1952, and after examination and study by Dr.

O. S. Proctor he was discharged with instructions to return to duty as of March 10, 1952.

Cross Interrogatory Number 23: He was still disabled when he was last released from the hospital, wasn't he?

[fol. 296] Answer to Cross Interrogatory Number 23: At the time of his discharge from the hospital on April 14, 1954, he was to be released to duty upon the recommendation of his local surgeon.

Cross Interrogatory Number 24: You sent a report to the Panhandle & Santa Fe Railway Company, didn't you?

Answer to Cross Interrogatory Number 24: I myself did not send a report to the Panhandle - Santa Fe Railway Company in regard to H. T. Arnold, that I know of.

Cross Interrogatory Number 25: While he was under your treatment, or when you examined him, it was your opinion that he should not resume his work for the railroad, wasn't it?

Answer to Cross Interrogatory Number 25: It was not my opinion that he should not resume his work for the railroad.

Cross Interrogatory Number 26: Heavy work will aggravate arthritic conditions, won't it?

Answer to Cross Interrogatory Number 26: Yes.

Cross Interrogatory Number 27: It is true, isn't it, that a report was sent from your hospital to the railroad in which it was recommended that Mr. Arnold be assigned to lighter work?

Answer to Cross Interrogatory Number 27: Several reports were sent from our hospital to the railroad which are not available at this time for review.

Cross Interrogatory Number 28: If you have stated in [fol. 297] answer to Direct Interrogatories that your examination included X-rays, then please answer the following three questions:

A. Did you take and develop them?

B. Were you present when the X-rays were taken?

C. If you did not take them and were not present then how do you identify them as being X-rays of H. T. Arnold?

Answer to Cross Interrogatory Number 28:

A. No.

B. No.

C. By the numbers which are imprinted upon all X-ray films at the time of the actual taking of the films, we are reasonably sure that the films are the films of a certain patient. In thousands of cases there has been no question as to whether the films are those of a certain individual, and we can assure you that the films which we have here as exhibits are the actual films taken of Mr. H. T. Arnold.

Cross Interrogatory Number 29: If you did not hand X-rays to the official taking this deposition as asked to do in the Direct Interrogatories, why not?

Answer to Cross Interrogatory Number 29: I did hand X-rays to the official taking this deposition.

Cross Interrogatory Number 30: It is true isn't it, doctor, that arthritis may exist without disability and be aggravated by injury and become painful and disabling? [fol. 298] Answer to Cross Interrogatory Number 30: Yes, that is true.

Cross Interrogatory Number 31: Have you discussed this deposition with anyone before it was taken, if so please state when and with whom?

Answer to Cross Interrogatory Number 31: No.

Cross Interrogatory Number 32: Who is present during the taking of this deposition?

Answer to Cross Interrogatory Number 32: Mr. Henry Flott, Denzell C. Heil, and myself.

Cross Interrogatory Number 33: What are you charging the Defendant for this deposition?

Answer to Cross Interrogatory Number 33: That will depend upon the time consumed in the taking of the deposition, which is not complete at this time.

Cross Interrogatory Number 34: Have you ever given Mr. Arnold a medical report regarding his condition?

Answer to Cross Interrogatory Number 34: I have never given Mr. Arnold a written medical report regarding his condition."

Mr. Cobb: At this time we would like to offer the Deposition of Dr. W. A. McClanahan taken on Waiver of Commission and filed among the papers in this case.

The Court: All right.

(Direct interrogatories of Dr. W. A. McClanahan read [fol. 299] by Mr. Cobb, answers read by Mr. Smith.)

"Direct Interrogatory Number 1: Please state your name, age and present residence?

Answer to Direct Interrogatory Number 1: My name is Ward A. McClanahan, age thirty-two. My address is 4445 Terrace, Kansas City, Missouri.

Direct Interrogatory Number 2: Do you hold a M. D. degree? If so, please state what schooling or other training you have received preparatory to the practice of your profession.

Answer to Direct Interrogatory Number 2: Yes. Following my degree I interned at King County Hospital, Seattle, Washington. Since my interneship, I have had approximately three years of training acceptable to the Orthopedic Board for specialization.

Direct Interrogatory Number 3: Are you licensed to practice medicine? If so, in what state or states are you licensed?

Answer to Direct Interrogatory Number 3: Yes. In Nebraska and Kansas."

Mr. Gallagher: Your Honor, we will admit the doctor is a qualified doctor. He can proceed with the others, if you care to work it that way.

Mr. Cobb: I think that is all of it.

The Court: All right.

(Mr. Cobb reading Direct Interrogatories and Mr. Smith reading answers.)

[fol. 300] "Direct Interrogatory Number 4: Where do you maintain your offices at this time?

Answer to Direct Interrogatory Number 4: University of Kansas Medical Center, Kansas City, Kansas.

Direct Interrogatory Number 5: Are you connected with or on the staff of any hospital at this time?

Answer to Direct Interrogatory Number 5: I am connected with the staff at the University of Kansas Medical Center as a resident in orthopedic surgery.

Direct Interrogatory Number 6: Were you on the staff

or connected with the Santa Fe Hospital at Topeka, Kansas, during the months of February, March and April, 1953?

Answer to Direct Interrogatory Number 6: Yes.

Direct Interrogatory Number 7: If you have stated that you were connected with such hospital at the times mentioned in the above question, please state whether or not you had occasion during such time to examine and treat H. T. Arnold of Lubbock, Texas?

Answer to Direct Interrogatory Number 7: Yes.

Direct Interrogatory Number 8: What period of time did your examination and treatment, if any, cover?

Answer to Direct Interrogatory Number 8: The examination began February 24 to April 10 of 1953.

Direct Interrogatory Number 9: Please describe in detail the nature of the examination or examinations that [fol. 301] you made of H. T. Arnold.

Answer to Direct Interrogatory Number 9: The examination consisted of a history of the patient's complaints, physical examination, routine examination of blood and urine, X-rays of the lumbosacral spine and cervical spine and a psychiatric consultation from Dr. John R. Adams, Menninger Clinic, Topeka, Kansas.

Direct Interrogatory Number 10: Did your examination or examinations include X-ray pictures?

Answer to Direct Interrogatory Number 10: Yes.

Direct Interrogatory Number 11: Were such X-ray pictures, if made, made under your direction and supervision?

Answer to Direct Interrogatory Number 11: Yes.

Direct Interrogatory Number 12: If you have stated that X-ray pictures were made under your direction and supervision, please state whether you made a study thereof?

Answer to Direct Interrogatory Number 12: Yes.

Direct Interrogatory Number 13: Do you normally study and interpret X-ray pictures made of persons whom you examine?

Answer to Direct Interrogatory Number 13: I normally study and interpret the X-ray pictures of the patients that I examine.

Direct Interrogatory Number 14: If such X-ray pictures are available at this time, we ask that you please hand the same to the officer taking this deposition, who will mark the

same as exhibits and attach them hereto as a part of this [fol. 302] deposition.

Answer to Direct Interrogatory Number 14: The X-ray pictures are not available so it will be impossible for me to hand the pictures to the officer taking this deposition, as requested under Question No. 14.

Direct Interrogatory Number 15: What were H. T. Arnold's complaints at the time you first saw him?

Answer to Direct Interrogatory Number 15: Mr. Arnold's chief complaint at the time I first saw him on February 26, 1953, was that of low back pain.

Direct Interrogatory Number 16: Did you take a history from H. T. Arnold? If so, please state such history in detail?

Answer to Direct Interrogatory Number 16: Mr. Arnold stated that the onset of his chief complaint occurred following the injury sustained January 16, 1952, while working for the Santa Fe Railroad. He stated that he had been admitted two times previously for work-up because of the back pain. Since the last admission the pain had gotten worse, so that he had been unable to work since December 31, 1952. He described the pain as being localized in the midline of the back. He described it as being constant and nonradiating. The pain was made worse by any exercise, and could be relieved by sitting straight in a chair.

Direct Interrogatory Number 17: Did Mr. Arnold give any history of an injury occurring about the year 1926? [fol. 303] Answer to Direct Interrogatory Number 17: Mr. Arnold gave a history of an injury in 1926, resulting in a fracture of the right leg.

Direct Interrogatory Number 18: Did your examination disclose any abnormalities in the body of H. T. Arnold were attributable to the injury received in 1926? If so, please state such abnormalities.

Answer to Direct Interrogatory Number 18: Examination of the right leg revealed approximately one-quarter inch shortening. No other abnormalities were detected.

Direct Interrogatory Number 19: Did your examination include an analysis of Mr. Arnold's posture? If so, please state your conclusions concerning his posture.

Answer to Direct Interrogatory Number 19: My exam-

ination included an analysis of Mr. Arnold's posture. It was my opinion the posture was not good because of a marked lordosis and a protuberance of the abdomen. There was also a pelvic tilt.

Direct Interrogatory Number 20: Did you attribute any of the conditions you found in his body to poor posture? If so, please state what conditions were attributed to poor posture?

Answer to Direct Interrogatory Number 20: The conditions that I found during the examination that contributed to the poor posture were those of a rather marked lordosis or sway back, and shortening of the right leg, resulting [fol. 304] in a pelvic tilt.

Direct Interrogatory Number 21: Please state what areas of Mr. Arnold's body were revealed in X-ray pictures, and identify such areas by referring to the exhibits attached to this deposition?

Answer to Direct Interrogatory Number 21: The areas revealed in Mr. Arnold's X-ray pictures consisted of views of the lumbodorsal spine and pelvis, also views of the cervical spine.

Direct Interrogatory Number 22: Did you find any evidence of fracture in the X-rays which could have occurred on or about January 16, 1952? If so, please state where such evidence was found on the X-rays attached to this deposition.

Answer to Direct Interrogatory Number 22: I found no evidence of fracture in any of the X-rays taken at the time I requested them on 2-27-53 of the cervical or lumosacral spine.

Direct Interrogatory Number 23: Did you find any evidence of a herniated or ruptured disc in the spinal area of H. T. Arnold? If so, please state which X-ray picture shows such evidence, and the area of the body where you found the evidence.

Answer to Direct Interrogatory Number 23: I found no evidence of any X-ray findings that would make me suspicious of the patient's having a herniated or ruptured [fol. 305] disc.

Direct Interrogatory Number 24: Did you find any evidence of osteoarthritis during your examination of H. T. Arnold?

Answer to Direct Interrogatory Number 24: There was evidence of osteoarthritis during the examination of Mr. Arnold in February of 1953.

Direct Interrogatory Number 25: If you have stated that you did find osteoarthritis, in your opinion, Doctor, for how long a period has such condition existed?

Answer to Direct Interrogatory Number 25: From the history and X-ray evidence alone, I am unable definitely to say how long the osteoarthritis existed prior to the taking of the X-rays. However, it is my opinion that the process of osteoarthritis had probably been present approximately five years.

Direct Interrogatory Number 26: Please state in layman's language what osteoarthritis is?

Answer to Direct Interrogatory Number 26: In layman's language osteoarthritis may be defined as an aging of the joints due to normal wear and tear upon such joints to a more or lesser degree.

Direct Interrogatory Number 27: Doctor, please state, basing your testimony on your findings, both subjective and objective, your diagnosis of the condition of H. T. Arnold at the time or times you examined him professionally.

Answer to Direct Interrogatory Number 27: As a result of my findings, both subjective and objective, the diagnosis [fol. 306] at the time that I first examined Mr. Arnold was that of chronic back strain, postural in type, and osteoarthritis."

Mr. Cobb: Do you want your Cross Interrogatories at this time.

Mr. Smith: Yes. They are short.

(Mr. Cobb reading Cross Interrogatories and Mr. Smith reading answers to Cross Interrogatories.)

"Cross Interrogatory Number 1: If you have answered in response to direct interrogatory No. 11 that X-ray pictures were taken by you or under your direction and supervision, please state whether or not these X-ray pictures faithfully and accurately portray that portion of the anatomy of H. T. Arnold which they purport to portray.

Answer to Cross Interrogatory Number 1: X-ray pic-

tures were taken under my direction and supervision, and portrayed the area, that is, the lumbosacral spine and the cervical spine, in which the patient complained of having sustained injury.

Cross Interrogatory Number 2: Please state whether or not in the X-ray pictures of the lumbar area of H. T. Arnold's back there is shown a reduction of the intervertebral space between the fifth lumbar vertebrae and the sacrum, and point out which X-ray, if any, shows this interspace.

Answer to Cross Interrogatory Number 2: I do not have the X-rays here for examination. The question in No. 2 [fol. 307] asks: Please state whether or not in the X-ray pictures of the lumbar area of H. T. Arnold's back there is shown a reduction of the interbertebral space between the fifth lumbar vertebra and the sacrum, and point out which X-ray, if any, shows this interspace.

Upon reviewing the chart, no mention is made by Dr. Finny of any narrowing of this area on the X-rays reported 2-27-53. X-rays obtained on the previous admission on 3-3-52, I quote from Dr. Finny:

'AP and lateral films of the lower dorsal and lumbar vertebrae and the AP film of the pelvis show no evidence of any recent fracture. Vertebral bodies show moderate hypertrophic changes. I see no narrowing of the intervertebral spaces.'

On 4-22-52, repeat X-rays of this area were taken. Dr. Finny reports, and I quote a portion of this report:

'The lumbosacral joint I believe is about average width.'

Cross Interrogatory Number 3: Please state whether or not you found any evidence of brain injury to H. T. Arnold.

Answer to Cross Interrogatory Number 3: I found no evidence of any brain injury upon examination of Mr. H. T. Arnold from the time February 24, 1953, to April 10, 1953.

Cross Interrogatory Number 4: Please state what examination or examinations you made to determine whether H. T. Arnold had a herniated or ruptured disc, and state what findings you rely upon for your conclusions reached [fol. 308] after making such study.

Answer to Cross Interrogatory Number 4: During my examination in February of 1953, I found no evidence to

make me suspect a herniated or ruptured disc. The findings that I relied on for this conclusion are those of muscle spasm, the low back, history of a radiating leg pain, neurological changes consisting of change of sensation over skin areas supplied by the nerve root impinged on by the herniated nucleus pulposus or herniated disc, changed in the reflexes, especially the ankle jerk, indicative of nerve root pressure, and occasional muscle atrophy of the calf muscle on the involved side."

Mr. Gallagher: We will offer the Cross Interrogatories which we have propounded to the witness, Dr. W. A. McClananhan.

(Mr. Gallagher reading Cross Interrogatories and Mr. Bean reading answers to Cross Interrogatories.)

"Cross Interrogatory Number 1: Doctor, you know that the Plaintiff, H. T. Arnold, has worked for the Panhandle & Santa Fe Railway Company since 1922, don't you?

Answer to Cross Interrogatory Number 1: Yes, I was aware that Mr. Arnold had worked for the Santa Fe Railroad since 1922.

Cross Interrogatory Number 2: You received history that he was injured while working for this same railroad company January 16, 1952, didn't you?

Answer to Cross Interrogatory Number 2: I received a history that the patient was injured while working for [fol. 309] the Santa Fe Railroad January 16, 1952.

Cross Interrogatory Number 3: After this injury he was admitted to the hospital on four different occasions, wasn't he? Namely, March 2, 1952, to March 5, 1952; April 22, 1952 to July, 1952; February 24, 1953 to April 10, 1953; April 7, 1954 to April 14, 1954.

Answer to Cross Interrogatory Number 3: I have examined the hospital chart, and the patient was admitted to the hospital at Topeka, Kansas, on four different occasions as follows: March 2, 1952, to March 5, 1952; April 22, 1952, to July 1952; February 24, 1953, to April 10, 1953; and April 7, 1954, to April 14, 1954.

Cross Interrogatory Number 4: When you first examined him he gave history of his back hurting in the cervical and lower lumbar areas, didn't he?

Answer to Cross Interrogatory Number 4: Mr. Arnold's chief complaint at the time I first examined him was pain in the low back. However, during the course of the examination he also stated that he had pain in the cervical region.

Cross Interrogatory Number 5: Your examination revealed distress over upper sacrum on extension and flexion of the lumbar spine, didn't it?

Answer to Cross Interrogatory Number 5: My examination revealed distress in the lumbosacral area with deep [fol. 310] palpation and also with extension and flexion of the spine.

Cross Interrogatory Number 6: Did the X-ray pictures as examined by you of Mr. Arnold show hypertrophic changes of the vertebral bodies?

Answer to Cross Interrogatory Number 6: I do not have the X-rays at this time to show the hypertrophic changes of the vertebral bodies. However, I will quote from the report given by Dr. Finny:

'On 2-27-53, AP, lateral, and oblique films taken in extension and flexion of the lumbar region show no significant bone or joint changes. The patient has some hypertrophic involvement which was present in the previous examination. I can see no change in the X-ray findings.'

Cross Interrogatory Number 7: Did the X-ray pictures as examined by you of Mr. Arnold show arthritic changes of the sacroiliac articulations?

Answer to Cross Interrogatory Number 7: Again, I do not have the X-rays and I do not recall any arthritic changes of the sacroiliac articulation. These were also not reported in Dr. Finny's report of 2-27-53.

Cross Interrogatory Number 8: Did the X-rays of the right hand show fracture of the middle finger with fragment of bone pulled loose from the anterior proximal aspect of the middle phalanx?

[fol. 311] Answer to Cross Interrogatory Number 8: Yes, X-rays obtained on 3-3-52 showed a fracture of the middle finger. I again quote Dr. Finny:

'PA and oblique films of the right hand show a small fragment pulled loose from the anterior proximal aspect

of the middle phalanx of the middle finger. I can see no other evidence of fracture.'

Cross Interrogatory Number 9: When Mr. Arnold was discharged from the hospital on March 5, 1952, didn't you make the diagnosis of 'bruised back and arm'?

Answer to Cross Interrogatory Number 9: I did not make a diagnosis of bruised back and arm March 5, 1952. I was not employed by the Santa Fe Railroad at that time.

Cross Interrogatory Number 10: He was readmitted to the hospital on April 22, 1952, with complaint of pain in the cervical, upper dorsal and lower back region, wasn't he?

Answer to Cross Interrogatory Number 10: The patient was admitted to the hospital on April 22, 1952. An examination of the chart at that time reveals the patient's complaint of pain in the cervical, upper dorsal, and lower back regions.

Cross Interrogatory Number 11: You found limitation on rotation of the neck, didn't you?

Answer to Cross Interrogatory Number 11: The question is: 'You found limitation on rotation of the neck, didn't you?'

[fol. 312] I did not examine the patient at that time, as I was not employed by the Santa Fe Railroad during the year of 1952. However, examination of the chart reveals that the admitting physician did find limitation on rotation of the neck.

Cross Interrogatory Number 12: You found tenderness to percussion over the right sacroiliac region, didn't you?

Answer to Cross Interrogatory Number 12: I may answer the twelfth question like the 11th: I did not find tenderness over the right sacroiliac region because I was not employed by the Santa Fe Railroad at that time.

Cross Interrogatory Number 13: Did you find shortening of the right leg?

Answer to Cross Interrogatory Number 13. During my examination I did find shortening of the right leg.

Cross Interrogatory Number 14: During all of his confinement periods in Topeka, there was continued evidence of arthritis present, wasn't there?

Answer to Cross Interrogatory Number 14: During the patient's confinement in the hospital at Topeka there was continued evidence of arthritis present.

Cross Interrogatory Number 15: When he was discharged from the hospital on July 12, 1954, a diagnosis of 'hypertrophic arthritis and back injury' was made, wasn't it?

Answer to Cross Interrogatory Number 15: I have no record that the patient was discharged from the hospital on July 12, 1954. Therefore, I do not know whether a [fol. 313] diagnosis of hypertrophic arthritis and back injury was made at that time.

Cross Interrogatory Number 16: He was readmitted to the hospital on April 7, 1954, for jaundice and hepatitis, wasn't he?

Answer to Cross Interrogatory Number 16: He was admitted to the hospital on April 7, 1954, for jaundice and hepatitis, according to the chart.

Cross Interrogatory Number 17: During his last confinement to the hospital he was still complaining of pain in the back, wasn't he?

Answer to Cross Interrogatory Number 17: During the patient's last confinement, the one that I have record of, April 7 to April 14, the patient was complaining of back pain.

Cross Interrogatory Number 18: Your diagnosis at that time was 'osteoarthritis, spine, lumbar; postural deformities, chronic back strain', wasn't it?

Answer to Cross Interrogatory Number 18: My diagnosis at that time—I imagine referring to 4-7-54—was not of osteoarthritis, spine. That was the diagnosis that I gave the patient on the admission from February to April of 1953.

Cross Interrogatory Number 19: When he was released from the hospital the last time you recommended reinstitution of the exercises which the patient was taught when admitted to the hospital after the injury in 1952, didn't you?

[fol. 314] Answer to Cross Interrogatory Number 19: I do not recall recommending reinstitution of the exercises at the time the patient was dismissed from the hospital on April 14, 1953.

Cross Interrogatory Number 20: If you have a lateral X-ray before you of the 10th dorsal vertebra please look at it and state whether or not it is wedge shaped?

Answer to Cross Interrogatory Number 20: I do not have the X-rays of the dorsal vertebrae here at the time of the deposition. I can not say or give any comments on the shape of the 10th dorsal vertebra.

Cross Interrogatory Number 21: Mr. Arnold first came to the hospital for treatment as an injured man, didn't he?

Answer to Cross Interrogatory Number 21: Examination of the chart revealed the fact that Mr. Arnold did come to the hospital for observation as a man injured on duty while working at the Santa Fe Railroad.

Cross Interrogatory Number 22: He was disabled at that time, wasn't he?

Answer to Cross Interrogatory Number 22: Again, I did not examine the man during the first hospital admission, so I can not say what degree of disablement this man had sustained.

Cross Interrogatory Number 23: He was still disabled when he was last released from the hospital, wasn't he?

Answer to Cross Interrogatory Number 23: At the time the patient was discharged on April 14 of 1954 the chart reveals the patient to return to duty at the recommenda-
[fol. 315] tion of the local surgeon. Again, nothing in the chart states how disabled the man was.

Cross Interrogatory Number 24: You sent a report to the Panhandle & Santa Fe Railway Company, didn't you?

Answer to Cross Interrogatory Number 24: It is my opinion that I did send the report to the Panhandle & Santa Fe Railroad Company. I believe it was a mimeographed form that we sent to the man's superior, notifying him of his condition.

Cross Interrogatory Number 25: Didn't you send a report to the master mechanic of the Panhandle & Santa Fe Railway Company after Mr. Arnold became a patient of yours in the hospital at Topeka, in which you stated that he, Arnold, 'could never return to the type of work he was doing when he was injured'?

Answer to Cross Interrogatory Number 25: I do not recall sending a report under the quotation, 'Mr. Arnold

could never return to the type of work he was doing when he was injured'.

Cross Interrogatory Number 26: Your opinion as contained in the report referred to above was based on injury complicated by arthritis, wasn't it?

Answer to Cross Interrogatory Number 26: Again, I can not answer this because I do not recall ever sending a report saying that the patient could never return to the type of work he was doing.

[fol. 316] Cross Interrogatory Number 27: If you have stated that you did not make such a report to the railroad, then will you please check the records of the hospital and state who did make such report?

Answer to Cross Interrogatory Number 27: I have checked the hospital chart, which has been made available to me, and I see no record that would state who made such a report.

Cross Interrogatory Number 28: If you have stated in answer to Direct Interrogatories that your examination included X-rays, then please answer the following three questions:

A. Did you take and develop them?

B. Were you present when the X-rays were taken?

C. If you did not take them and were not present then how do you identify them as being X-rays of H. T. Arnold?

Answer to Cross Interrogatory Number 28: I did not take the X-rays nor develop them at the time that I ordered X-rays be taken of Mr. Arnold. I was not present when the X-rays were taken. I identified the X-rays by a marker on the X-ray film used in the X-ray Department to identify the patients.

Cross Interrogatory Number 29: If you did not hand X-rays to the official taking this deposition as asked to do in the Direct Interrogatories, why not.

Answer to Cross Interrogatory Number 29: I did not hand the X-rays to the official taking this deposition because the X-rays were not available.

[fol. 317] Cross Interrogatory Number 30: It is true, isn't it, Doctor, that arthritis may exist without disability and be aggravated by injury and become painful and disabling?

Answer to Cross Interrogatory Number 30: Yes, it is true that arthritis may exist without disability and may be aggravated by injury and become painful and disabling.

Cross Interrogatory Number 31: If you have stated in answer to Direct Interrogatories that the condition or any part of it which you found Mr. Arnold to be suffering from after his injury in 1952, was due to a prior injury in 1926, such prior condition did not keep him from working for the same Defendant for a period of twenty-six years did it?

Answer to Cross Interrogatory Number 31: I stated earlier that I did find a condition as a result of an injury in 1926. This probably did not keep him from working because the records show that the patient worked off and on until December of 1952.

Cross Interrogatory Number 32: Doctor, you prepared and signed Attending Physician's Report dated April 6, 1953, in which you stated the following:

'Patient's name—Arnold, Harry T. What is your diagnosis?—Lumbo sacral strain. Was patient confined to Hospital?—Yes, from February 24, 1953, to date. On what date was or will patient be able to perform any duties?—Unknown. Dated April 6, 1953. Signed W. A. McClanahan, M. D. Address—A. T. S. F. Hospital, Topeka, Kansas. Graduate of University of Ne-
[fol. 318] braska.'

Answer to Cross Interrogatory Number 32: The information under No. 32 of the deposition is similar and may be identical to the attending physician's report dated April 6, 1953, and signed by me.

Cross Interrogatory Number 33: Doctor, has anyone connected with the Defendant, Panhandle & Santa Fe Railway Company, discussed this deposition with you? If so, please state who.

Answer to Cross Interrogatory Number 33: Yes, I have been contacted by the Santa Fe Railway Company concerning this deposition. Mr. T. E. Stanford, and Mr. Irwin, General Claim Agent, Amarillo, Texas.

Cross Interrogatory Number 34: Who is present during the taking of this deposition?

Answer to Cross Interrogatory Number 34: During the

taking of this deposition Miss Loraine Edmonds and Mr. Stanford were present.

Cross Interrogatory Number 35: What are you charging the Defendant for this deposition?

Answer to Cross Interrogatory Number 35: My charge for this deposition will be $75.00."

The Court: Does that conclude the reading of your depositions?

Mr. Cobb: Yes, sir. At this time that is all we have.

The Court: Are you in position to rest at this time?

[fol. 319] Mr. Cobb: Yes, sir.

(Court recessed until 1:30 P. M. November 24th, 1954.)

JURY OUT

1:30 P. M. November 24th, 1954

JURY IN

The Court: What says the defendant Billings?

Mr. Smith: We will call Mr. R. A. Billings. You will take the stand, Mr. Billings.

R. A. BILLINGS having been first duly sworn testified on direct examination by Mr. Smith as follows:

Q. State your full name, please sir.

A. R. A. Billings.

Q. Where do you live, sir?

A. 2224 40th Street, Lubbock, Texas.

Q. How long have you lived in Lubbock?

A. Forty years.

Q. How old are you?

A. Forty years old.

[fol. 320] Q. What is your business, Raymond?

A. Transfer Company, trucking concern.

Q. Is that your private business?

A. Yes, sir.

Q. Private individual proprietorship?

A. Yes, sir.

Q. How long have you been operating this trucking business?

A. By myself, since 1948.

Q. Mr. Billings, I will ask you to state whether or not you recall on or about January 16th, 1952, when a report came to you that an accident had occurred involving one of your trucks?

A. Yes, sir, I do.

Q. At that time what, if anything, were you and your trucking business doing with reference to hauling mail from the Santa Fe Railway Company tracks?

A. I didn't quite understand that question.

Q. Maybe I have it too long. Did you have a mail hauling contract at that time?

A. Yes, sir, I did.

Q. Where did you haul the mail from and where to?

A. Panhandle & Santa Fe Railway Company.

Q. Here in Lubbock?

A. Yes, sir.

Q. Now Mr. Billings you have been present in court, and observed the drawing of the diagram on the blackboard [fol. 321] there, have you not?

A. Yes, sir.

Q. And in hauling the mail from the railway premises, I will ask you to state if generally that diagram that is on the blackboard, does that represent the area pretty well where you went with your trucks to get the mail?

A. Yes, it does.

Q. Now where did you haul that mail to?

A. To the Post Office Annex, which is located on Avenue F and the Post Office itself, located on Avenue G, between 10th and Main.

Q. About how many trucks did you have engaged in that operation?

A. Three.

Q. Were they all about the same kind of trucks?

A. Yes, sir, approximately, with the exception of one smaller truck, a pickup, which we call a pickup, it is actually a ton and a quarter stake body truck that we use for light services between here and other points.

Q. On January 16, 1952, did you have Joe T. Stone working for you as a truck driver?

A. Yes, I did.

Q. I will ask you to state Mr. Billings what was your function, if any, in your daily operation of the moving of the mail from the railway premises to where you moved it, what did you do?

A. Supervised, and also helped load the mail in and out of the trucks—cars onto the trucks and saw that they got [fol. 322] away from there down to their destination.

Q. Were you ordinarily present in the area there around the tracks when the mail was loaded?

A. Ninety nine times out of a hundred, I was, yes, sir.

Q. Did you personally supervise your employees as they carried on that operation ordinarily?

A. Yes, sir, I did.

Q. On the 16th of January 1952, I will ask you to state whether or not you witnessed an accident that is alleged here, to have occurred at that time.

A. No, I did not.

Q. When did you first know of that accident?

A. Just a short time afterwards.

Q. Who told you?

A. Joe T. Stone.

Q. And where were you when he told you?

A. I was in my office.

Q. Where is your office located?

A. It is located a block and a half directly down the tracks on Avenue F.

Q. You say directly down the tracks, in what direction?

A. That would be West. On the West side of the cars, from the cars would be directly West.

Q. And Mr. Billings, how long prior to that date had you been using this one-way drive that was being used on [fol. 323] that date?

A. Since the time it was designated as a mail area, which I believe was in 1950. When this roadway had been widened and designated as a mail area. The only place to unload the inbound mail for Lubbock only.

Q. Please state when, if you know, that driveway in the form that it existed there in January 1952 was built?

A. 1950, I believe, is correct, sir.

Q. And did you know for what purpose it was built?

A. It was built for mail trucks to unload mail from that side, the West side of the cars.

Q. Will you step down here and show the Jury just how you got into the area to get up to the baggage car to unload the mail?

A. There was only one way to come into this area and that was over to the West of this driveway, across a platform that led across the rails, in order to pass the trucks over coming in from the South, going North, either driving in or backing in, and at that time it was actually easier and better to drive in and back out for the way the mail was loaded in and out of the cars. As a general rule the majority of the mail was unloaded from a center car and then we had to back out for the purpose was that the big trucks would not go any other way. There was no way provided for us to cross at either end, with the exception of the South end.

Q. Why couldn't you drive out the North side?

[fol. 324] A. Well, there wasn't enough room. Right at the end of these cars, immediately to the West side was a steam outlet, and coming from the depot itself was three steel pillars or bars, extending approximately five feet six inches from the edge of the depot out, and above that was a large concrete pillar with a flower pot on it and it wouldn't permit a truck with a wheel base of 204 inches which this truck did have, to even make a turn to go between them, turn around in that small area. It takes approximately 300 feet to turn that truck in any one spot, in a complete circle.

Q. I will ask you, Mr. Billings, whether or not you had specific instructions from the Railroad Company about whether or not you were to proceed to the North out of that area?

A. We had specific instructions not to proceed North, or on the concrete course way, which was where the passengers loaded on the inbound-outbound trains at any time.

Q. Do you know how wide the one-way drive was? Did you ever measure that?

A. Approximately eleven feet.

Q. Do you know what truck was involved in this accident on January 16, 1952?

A. Yes, I do.

Q. What truck was that?

A. It was a Chevrolet with a bob-tail van on it, 16 feet long, 204 inch wheel base.

[fol. 325] Q. Who was driving the truck, do you know?

A. Joe T. Stone.

Q. I will ask you to look at Defendant's Exhibit Number 2 and state whether that appears to be a picture of the same truck?

A. That is the truck, sir.

Q. And is that the way that truck looked on that date?

A. Yes, it is.

Q. Now, you notice there Mr. Billings, what is that right there on the extreme left at the front?

A. Attached to the front?

Q. Yes, sir.

A. That is a rear view mirror, sir.

Q. Now, of course, you can't see the right side from that picture, but I will ask you to state whether or not there was such a mirror on the other side?

A. There was, stationary.

Q. Was it just like this one?

A. Yes, sir.

Q. Were those mirrors fixed—you say it was stationary, how was it made stationary?

A. Stationary providing for a driver to see from a sitting position under the steering wheel from either side behind him down the side of the truck.

Q. Were they easily—did they flop around?

A. No, sir, they didn't.

[fol. 326] Q. On this specific truck, is that true? Were those mirrors so situated on January 16th, 1952?

A. That is correct.

Q. Do you inspect your equipment daily or regularly?

A. Daily.

Q. You do that personally?

A. Personally, yes, sir.

Q. Do you have a large number of trucks, or is that a relatively small operation?

A. It's a relatively small operation.

Q. Did you personally supervise that business?

A. I did.

Q. I will ask you to state what were the facts, if you know, with reference to whether that truck on January the 16th, 1952, prior to this collision and at the time of the collision had good brakes?

A. It did.

Q. Was it in good mechanical condition all the way around?

A. It was, sir.

Q. Mr. Billings, did you observe that truck on January the 16th, 1952, in the one-way drive, prior to the time of this accident?

A. Yes, I did.

Q. And just tell the Jury what you saw and what times you saw it there and where you were?

A. I was there until the truck was approximately two-thirds loaded and I returned to my office to outline the [fol. 327] work of the rest of the day for the other trucks.

Q. Now, right there, you say the truck—where was the truck when you returned to your office?

A. It was backed up to the—which would be the north door of the middle car on that spur.

Q. And, not in the position that you see it on this diagram?

A. No, it was not.

Q. Was it angled in there, or was it long-side, parallel?

A. It was angled in there, but not that sharply. It was angled in back to the door so the mail handlers inside of the car, the Santa Fe's, could lay the mail out on the back of the tail gate, in order that we might load it up in the van.

Q. Now, did the Santa Fe employees help load those trucks?

A. They did.

Q. And, did you see any of them out there that morning?

A. There was five of them there, yes, sir.

Q. At the time you left, had the first baggage car been unloaded already?

A. Yes, sir, it had been.

Q. Now, did you again see that truck on that morning, prior to the accident?

A. No, I saw it as it was backing down the concourse, when it was leaving.

Q. Where were you when you——

[fol. 328] A. I was at my office.

Q. Now how far away is that?

A. About, I would say approximately a block and a half, maybe a block and two-thirds.

Q. Would you step over there to the diagram and just make an X there showing about where your office was with reference to the location of this——

A. (Witness marking on diagram.) There is a small building located right here. (Indicating.)

Q. What is that, if you know?

A. That is the Claim Agent's Office.

Q. Draw the building in there.

A. This alleyway comes right off of the North side of this building, Avenue F, and my office is located right here (indicating).

Q. Why were you looking in that direction?

A. I was wondering why the truck was being delayed, and as I usually do every morning if I was at the office, because at that time of day the truck is due at the Post Office Annex.

Q. Just have your seat, Mr. Billings.

(Witness taking Witness Stand.)

Q. I believe you said, however, that you did not see any part of this accident?

A. No, I didn't.

Q. But you saw the truck moving somewhere in that area?

[fol. 329] A. Yes, sir, I did.

Q. Was it moving fast or slow at the time you saw it moving?

A. It was moving comparatively slow, it couldn't be very fast.

Q. Could you estimate the speed at which it was moving?

A. Somewhere between five and seven miles an hour.

Q. Now, I will ask you Mr. Billings, if in the course of your operations, in removing that mail from those baggage cars, if you instruct your employees with reference to safety measures in doing that?

A. Yes, sir.

Q. What did you tell them?

A. I told them time and time again, and still do, in backing out of an area such as that, where they are working, to never back out any faster than the truck will move.

Q. And was that truck moving about that fast or faster?

A. It was moving about as fast—about as slow as the truck would run in reverse gear.

Q. Now on the occasions that you have been there, have you ever seen anybody backing out of that narrow one-way drive at a fast rate of speed?

A. No, sir, I haven't.

Q. Any truck or any vehicle?

A. No, sir.

Q. Would that be easy to do?

A. It would be rather hard to do.

[fol. 330] Q. How long have you been engaged in truck driving and operating trucks?

A. Since 1929.

Q. And would it be easy to drive one of your—the truck that you had there that morning backward at the rate of 15 miles an hour in that narrow space without running into something?

A. It would be almost impossible.

Q. I will ask you to state, please, how long had you hauled mail for the Government up to 1952?

A. Me, personally, sir?

Q. Yes.

A. Oh, since 1933, off and on, I would say 18 years.

Q. Before they built this one-way drive there for your use, what area did you use in unloading the baggage cars?

A. The area immediately to the East of these cars, approaching from the same direction as they do now.

Q. And was there—how did you enter on that side, on the East side?

A. In the same manner as we are doing at the present time, we entered from the West side of these cars, coming up on the East side and backing out down the concourse and circling out in this manner (indicating).

Q. Were you instructed by the railway to change from the other side?

A. Yes, sir, we were.

[fol. 331] Q. Were you given a reason for that?

A. Because it was designated as a mail area to unload those cars.

Q. Were you given a reason why they didn't want you to use the other side any more?

A. No, not specifically. The main reason was that it wasn't quite solid enough for those trucks to be in there.

Q. In all of the time that you had used that area up until January 16th 1952, had there been any accidents of any kind?

A. No, sir.

Mr. Gallagher: We object to whether there has been any accidents or not, it has no bearing in this suit at all.

The Court: Sustain the objection.

Q. I will ask you, sir, how long Joe T. Stone had been working for you prior to the accident?

A. Two years.

Q. As a truck driver?

A. Yes, sir, as a truck driver.

Q. And what was his safety record with your company?

Mr. Gallagher: Just a second, what he has done in the past, good bad or indifferent is immaterial in this case. We want to know what he did here.

The Court: Sustain the objection.

Q. Mr. Billings, on January 16th, 1952, you say that Mr. Stone reported to you that there was an accident?

[fol. 332] A. Yes, sir.

Q. Did you at that time make an investigation?

A. Yes, I did.

Q. Where did you go?

A. I went back down to the scene of the accident.

Q. And did you find anybody there?

A. No, sir, I didn't.

Q. Who were you looking for?

A. Mr. Arnold.

Q. Had you been told that H. T. Arnold was involved?

A. Yes, sir, I had been told that Mr. Arnold was involved.

Q. And did you see him that day at all?

A. No, I didn't. When I went down to see him I was told

that he had already gone to the hospital and I called one of the railroad officials in the afternoon to see how—to see what damage there was and whether the man was hurt and how he was hurt.

Q. Did you get to talk to anybody about that?

A. No, except for the telephone conversation.

Q. Just what the railroad people told you?

A. Yes, sir.

Q. Did you ever talk to H. T. Arnold or did he ever talk to you?

A. Yes, I talked to him approximately ten days after the injury occurred.

Q. Where did you see him?

[fol. 333] A. I didn't talk to him personally. It was a telephone conversation.

Q. Did he call you, or did you call him?

A. He called me, sir.

Q. Did he tell you what the extent of his injuries was then?

A. Yes, he told me his arm was hurt and it was rather sore.

Q. Anything else?

A. No, that was all.

Q. Did you ever talk to him on any other occasion?

A. No, sir, I never did.

Q. Did he tell you in that telephone conversation anything about having hurt his back, got his back hurt in that truck collision?

A. No, sir, he didn't.

Mr. Smith: Pass the witness.

Mr. Cobb: We don't have any questions.

Cross-examination.

By Mr. Gallagher:

Q. Mr. Billings you say that you were located at your office when you saw your truck backing up on the morning of January 16th, 1952?

A. Yes, sir.

Q. How many yards was your office from the place where they were loading the mail?

A. I never did measure.

Q. Approximate it.

[fol. 334] A. Approximately 250.

Q. 250 yards?

A. Would be my guess, that is just a guess.

Q. That would be a couple of blocks?

A. No, not a couple of blocks, a block and a half or a block and three-quarters.

Q. Were you looking at the rear of the truck when it was moving?

A. Looking at the side.

Q. Just put an "X" on your office there with respect to that passageway (witness writing on blackboard).

What was your occasion to be looking at it?

A. That was a natural habit I have formed. Every morning I look at them, every morning.

Q. You didn't know then that there was any wreck though?

A. No, sir, I didn't.

Q. At that time there wasn't anything to attach any importance to the truck's movement?

A. Yes, sir, the time of the truck leaving there, that was recorded almost everyday.

Q. You remembered back then after something happened and made up your mind how fast you thought he was going?

A. No, sir, that was everyday practice.

Q. The truck, your truck was not directly opposite you, was it?

A. It was directly opposite me when I observed it, yes.

[fol. 335] Q. Was it going faster than a man could walk?

A. Three to four miles an hour.

Q. Had the wreck occurred when you were—was it before or after the wreck that you saw him move?

A. I had no way of knowing.

Q. Where was his position when you saw him? Put a—just point it out to me, I want to know.

A. In this area right here (indicating) approximately between the two cars.

Q. He was going backwards?

A. Yes, sir, he was going in a reverse position.

Q. Now, Mr. Billings, without too much detail when were those lights put in there?

A. They were put in there at the time that roadway was widened.

Q. You never hauled any mail at night did you?

A. Yes, sir. Every night, 365 nights out of the year.

Q. You did have night use for that——

A. Not in that area, no, sir.

Q. Did you haul it in the day time from this area or at night time?

A. We loaded at night from that area.

Q. You did load?

A. Yes, sir.

Q. As I understand it, the railroad provided a place for you to use, is that right?

[fol. 336] A. Yes, sir.

Q. And they instructed you what to use, and the way to go?

A. They didn't instruct me what to use, they instructed me where to use and for what purpose.

Q. Well they said to use this passageway and no other?

A. That's correct.

Q. They built that for you?

A. That's correct.

Q. Whatever the hazard is, the company itself and not you made it, is that right, the railroad company?

A. If there was a hazard.

Q. I say if there is a hazard?

A. Yes, sir.

Q. Let's see, what is the distance from the grass to the edge of a coach standing there?

A. I would say——

Q. Not the rail, the coach?

A. The coach, approximately ten and a half feet.

Q. What is the width of that truck?

A. Ninety-two inches.

Q. That's eight feet?

A. No, sir, that is not eight feet. Eight feet is ninety-six inches.

Q. Ninety-two inches, a little less than eight feet?

A. Yes, sir.

[fol. 337] Q. And you have a little—ten feet seven or eight width?

A. Yes, sir.

Q. Now, that doesn't leave much clearance, does it, which they provided you to travel on?

A. It is sufficient clearance.

Q. Now, is it a reason why you don't back in and drive out, that if you hang your head out the window you might hit the side of the coach?

A. You can not hang your head out the window driving a truck.

Q. You can't do it?

A. No, sir.

Q. You can't back out that way?

A. No, sir, you would never get it back there.

Q. Can you look down at the curb and drive?

A. No, you can not, that is why we provided the mirrors.

Q. Would the—could you back the rear view—look through the right rear view miror and back a truck out of there?

A. Yes, sir. You look through both, you don't look through just one at all. You look for clearance on both sides.

Q. If a man is three feet in from the track, from the side of the coach, he wouldn't be visible in that mirror along that truck bed would he?

A. As long as he was even with the side of the truck, yes, sir, he would be.

[fol. 338] Q. If he was further towards the left, further towards the left wheel from the side of the truck, he would not be visible?

A. No, sir, if he is behind the truck he is not visible.

Q. It would have been a safer transaction if that had been a couple of feet wider, wouldn't it? A safer place for you to work on?

A. Well not necessarily, no, sir.

Q. If you go down there with, I think seven feet eight inches, there is only about two feet and one inch clearance, a foot for either side, isn't that true——

A. Yes, sir.

Q. —arithmetic?

A. Yes, sir.

Q. So a man can't stand between, if he is going down the middle, he can't stand between the edge of the car and the truck without being hit?

A. No, he can not.

Q. That sounds not very safe, doesn't it?

A. From the sound of it it sounds not, but we use lots more narrower drives than that.

Q. Well, I say if you increased the driveway, the width, it would be a safer proposition obviously, wouldn't it?

A. Possibly so, yes, sir.

Q. Is that—is Mr. Stone in your employ now?

A. No, sir, he isn't.

[fol. 339] Q. You discharged him?

A. No, sir, he quit of his own accord.

Q. What date did he quit?

A. As well as I can remember without checking through records it was in August of 1952, or September of '52.

Q. How full did you fill those trucks?

A. As full as possible.

Q. Up to the top, huh?

A. Yes, sir, from the bottom to the top.

Q. When your driver, on that morning, got off from—he was on the truck loading, wasn't he?

A. Yes, sir, he was.

Q. He could see down the track, couldn't he?

A. Yes, sir.

Q. When he got off the end of that truck, jumped down to the ground, and went around to the left side to get in the cab, he could see all the way down that passageway?

A. Yes, sir, he could.

Q. And Mr. Arnold, if he was there?

A. That's correct.

Q. And he would know from that that there was a workman present there?

A. That's correct.

Q. Could—did the property, all of the property, service property there belonged to the railroad didn't it?

[fol. 340] A. Yes, sir.

Q. And could it prohibit you from one side rather than the other of unloading mail?

A. Yes, sir.

Q. Did it exercise that authority over you and your driver?

A. Yes, sir.

Q. Could it direct the speed at which you would enter and leave if it wanted to?

A. Yes, sir, it could.

Q. Don't you think that a truck could have gone forward if it wanted to?

A. No, sir, it could not have, impossible.

Q. You say that can't be done?

A. It can't be done, not at that time that this station was there.

Q. The old station?

A. I am talking about the old station.

Q. How much clearance was there between the corner of the station and the tracks?

A. There wasn't that much.

Q. I say how much?

A. About six foot, six and a half, where that truck would pass. Now you understand that truck was 13 feet high. It could not go—that big truck could not go between the building and the tracks to go around the concourse. I could not turn and go out, with the exception of backing all [fol. 341] the way down to this point, and then there are two large trees here, that even if it should come across there it would still drag.

Q. Could your truck have pulled up and backed up there and gone out forward?

A. No, sir, it could not. There isn't sufficient amount of room from the edge of the curb which is here (indicating), to the back edge of these cars, or the steam lines, or these rods extending from the edge of the depot to allow that truck to even back up and maneuver between there.

Q. In other words, as far as you are concerned, you were compelled to go out the way you came in?

A. You have got—you are compelled to either—if you back in you will drive out and if you drive in you will back out.

Q. It was a matter with you of taking what they made for you, is that right?

A. Correct.

Q. Did you have some trucks that sometimes hauled the mail that could go through in front of the station?

A. I had a pickup that would—that could have gone through there if it had been necessary. It was never necessary.

Q. But this special one could not do that?

A. No, sir, that was a large truck and could not go [fol. 342] through there.

Mr. Gallagher: I believe that is all. Thank you.

Mr. Cobb: No questions.

The Court: You may step aside.

Dr. Sam Dunn having been first duly sworn testified on direct examination by Mr. Smith as follows:

Q. State your name, please sir.

A. Sam G. Dunn.

Q. What is your profession.

A. Practice of medicine and surgery.

Q. Where do you live.

A. Lubbock, Texas.

Q. How long have you lived and practiced medicine in Lubbock?

A. Since 1926.

Q. Are you a licensed physician?

A. I am.

Q. Is your license recorded in the District Clerk's Office here in Lubbock County?

A. Yes.

Q. What schools are you a graduate of, Dr. Dunn?

A. University of Texas Medical School, and I took my post graduate work in surgery, my residency in the City County Hospital at Fort Worth and post gradute work in surgery and interpretation of X-rays King County Hos- [fol. 343] pital in Brooklyn, New York.

Q. And have you had any other training for your profession?

A. Well, of course, I take post graduate work, and am a member of the American College of Surgeons, and Texas

Surgical Society and that requires two week clinic courses every year.

Q. Dr. Dunn, have you practiced in Lubbock practically all of your professional life?

A. Ever since I finished hospital training.

Q. Are you connected with any hospital in Lubbock?

A. Yes, I am Chief of the Surgical Staff of the West Texas Hospital.

Q. How long have you held that position?

A. Well, off and on since 1936. I have been on the staff since '26.

Q. In your work do you do orthopedic surgery?

A. Yes, I don't confine my work to orthopedic surgery.

Q. But that is part of your work that you actually do?

A. Yes, sir.

Q. How long have you been engaged in orthopedic surgery?

A. Well, orthopedic surgery, I have been engaged in orthopedic surgery since I have been in Lubbock.

Q. All the time?

A. Yes, all the time. It is general surgery, of course, which now since they have been mixing gasoline and spiritus frumenti we get quite a lot of orthopedic surgery.

[fol. 344] Q. Doctor, in the course of your work, do you also—have you had training and experience in interpretation of X-rays and diagnosis of ailments based upon X-ray findings?

A. Yes.

Q. Have you done that most of your professional life here in Lubbock?

A. Yes, we have our own X-ray department in my section.

Q. Are you acquainted with Mr. Harry T. Arnold?

A. Yes.

Q. Who sits here in the Court Room?

A. Yes, sir.

Q. Have you had occasion to treat him in your professional work?

A. Yes.

Q. Can you tell the Jury about when you first saw him and over what period of time you treated him?

A. Yes, we saw him first, the 1st of January, 1953 and at frequent intervals from that time on until approximately a few months ago.

Q. Are you associated any way with the Santa Fe Railway Company here?

A. Yes, I am Consulting Surgeon for this Division of the Santa Fe.

Q. Was it in that—was that the reason that Mr. Arnold came to you?

[fol. 345] A. Yes, I am sure it was.

Q. And doctor, I will ask you first, whether you took X-rays when he first came to you?

A. No, I didn't take X-rays when he first came to me, because he had already had X-rays by Dr. Batson, who is the regular local surgeon for the Santa Fe, and a little later on I requested—told him that we wanted to take X-rays and he said that his attorney had requested that none be made.

Q. Did you ever get to take X-rays?

A. No, I had access to Dr. Batson's X-rays, they were made immediately after the injury, so these—what I wanted to make was approximately a little over a year later, more or less to check his progress and see how he was getting along.

Q. Now, doctor, did you also from time to time confer with the doctors in the Association Hospital at Topeka, Kansas?

A. Yes, I sent him up there and—of course, a condition of this nature improves very slowly and I felt like the Chief Surgeon would probably like to have a look at him, since his disability was going quite a long time, so I suggested that he go to Topeka to the Main Hospital of the Santa Fe Railroad.

Q. Doctor, before we go any further maybe we had better go back. What type of examination, what kind of an examination did you make on Mr. Arnold when he first came to you in January 1953?

A. Well, he was complaining particularly of his back and, of course, we checked him over in general first and [fol. 346] checked his back in particular.

Q. And——

A. Gave him—the form of treatment, we gave him physiotherapy with heat treatments and injections for arthritis, of course, he had already been treated for arthritis by Dr. Batson and the diagnosis had already been made. We more or less saw him in consultation and continued the treatment that Dr. Batson had instituted.

Q. What was your diagnosis of his case, doctor?

A. My diagnosis was arthritis of the spine particularly. Of course, he had a history of an old injury in a wreck or something, wherein his right leg was somewhat shorter than the other and that necessarily would cause a tilting of the pelvis and a change of position of the back bone and that more or less aggravated his condition.

Q. Doctor, you say you did see Dr. Batson's X-rays?

A. Yes.

Q. Will you please step down, and without looking at all of them—(Dr. Dunn standing in front of view box) first, doctor, here is one which is marked D-12, taken February 12th, 1952, I will ask you to please examine that—let's have a look at that, what does that appear to be?

A. That is a lateral posterior view of the neck and upper portion of the chest.

[fol. 347] Q. Do you find any abnormalities revealed there, on that date?

A. No, none from this position.

Q. All right, sir. I will ask you to look at this one marked D-11 and tell us what that shows?

A. That is a lateral view of the same area.

Q. What did you find in that, doctor?

A. I find some evidence of arthritis as noted, for example, in the sixth cervical vertebra. See that little tit right there, see that flattening out of the upper portion here, that is arthritic changes or what we call spurs. That is natures attempt to freeze, so to speak, these bones together. All of these interspaces are natures shock absorbers. They are filled with discs which have a soft center and a hard outer covering, and that is why when we walk, if we didn't have that shock absorber between each one of our back bones and chest bones and neck bones, the frame would be jarred every time we walked, that absorbs that, and you see nature, in cases of arthritis, attempts to fix those together somewhat. The only thing

that I find there are these arthritic changes in that sixth cervical vertebra.

Q. Doctor, you talk about arthritis, what is the evidence of arthritis, is it lipping and spurring?

A. Yes, this little spur here and the lipping, the same thing.

Q. Does that appear to be separated?

A. It appears to be, yes. That is—you see the same thing [fol. 348] in the neck.

Q. Does that indicate an injury of any kind?

A. Not necessarily, no.

Q. Now, doctor, do you think this sixth cervical vertebra shows any evidence of fracture or compression?

A. There is a narrowing right there, see the top—see this comes more or less to a point here, and it is kind of blunted portion here. That is a slight narrowing there that I feel must have been there sometime because of the presence of the lipping.

Q. How long would it take lipping to grow to such an extent that it would show on an X-ray? Could it do that in 14, 16 or 18 days?

A. No, it would be impossible to grow that fast.

Q. Or a month?

A. I would say it takes years for lipping to show. A lot of it depends on the amount of calcium one has in his blood.

Q. Would the condition you see there doctor, that little white dot, would that be calculated to cause any disability or extreme pain?

A. I don't think so. I have got one that never bothers me any.

Q. Will you put that in there. (Witness putting X-ray in view box.)

A. That is a lateral view of the lumbar spine, from here up is the dorsal and topping it off with the cervical.

[fol. 349] Q. Doctor, do you find any abnormalities in that?

A. Yes, we find that lipping, you see that is present. A little spurring or lipping, it is nature's attempt—just like if any of you have been to Carlsbad Caverns and seen the stalactites and stalagmites, you might liken these to those deposits, these are stalactites and these are stalagmites.

Q. Now Doctor I will ask you to state whether or not, considering this was taker February 12th of this man, and the accident occurred on January 16th of the same year, could it be possible that this lipping you have pointed out was caused by a fall that compressed all of those vertebrae together and squashed them, and made those edges sharp?

A. There is no evidence of squashing here. These are all normal in contour with the exception of the lipping here. There is no evidence of a fracture there or compression of the bodies of any vertebrae.

Q. Would you look at the picture, the condition between the fifth lumbar and the sacrum, the interspaces of the posterior picture, or is that abnormally narrow spacing there for a man of his age?

A. That is what we call a spondylolisthesis, don't ask me to spell it, you know, he is sway backed. It is probably, I think that is probably due to the shortening of his leg. It has compensated for it over a period of years and some people have a tendency towards sway backs. You see, there is a narrowing of this portion here with a widening [fol. 350] of this and that is what we call spondylolisthesis. Now that often accompanies arthritis to the lumbar area and it is quite often that it is congenital. Sometimes people are born with spondylolisthesis.

Q. Is there any reasonable probability that was caused by recent injuries, as recent as January 16th?

A. Well, in view of the lipping that is present I know that it must have been there for years. One can't just unequivocally say that it was not caused somewhat by that. You can't say it was and you can't say it wasn't, unless you had a picture before this accident. Now if you had an X-ray of the lumbar area made before this present accident in 1953, you could say flat-footed whether it was or it wasn't. That is the only way you could. It is my opinion that it has probably been there for some time as evidenced by these spurs and the lipping that is present.

Q. And if that is arthritis, that lipping and spurring, could that have generated to the extent that you would find it there since January 16th, 1952?

A. No.

Q. I will ask you to look at Defendant's Exhibit Number 8. What part of the body is that?

A. The same area, an AP view. That shows a little more graphically these spurs, you see there is one hanging down here a half an inch nearly, and the same thing over [fol. 351] there. That is on the second and third vertebrae you see these spurs here. I think all of you can see them, they are on the second and third.

Q. Is that rather extensive?

A. Yes.

Q. Is that enough to cause a man symptoms or pain?

A. Yes, I think spurs that large would cause it.

Q. All right, look at Defendant's Exhibit Number 10, what is that?

A. That is the same view. That is the same view—not the same view, but upper, from above, I mentioned. The other was the lumbar, this is the dorsal area, the chest.

Q. Do you find any abnormality there?

A. From back forward. Yes, I do. You notice—you see this slight narrowing of the vertebra.

Q. Which one is that?

A. That is the ninth, there is a slight narrowing of the ninth, the body of the ninth vertebra, dorsal vertebra.

Q. Doctor, this X-ray was taken on February 12, 1952, what is your opinion, or do you have an opinion, as to what caused that narrowing and when it was caused?

A. Well, you would have to have a lateral view of the same to make a diagnosis. You can see some slight change there, but you would have to have a lateral view of the same area to appreciate exactly how much compression [fol. 352] that there is.

Q. I will ask you to look at Defendant's Exhibit Number 7, is that a lateral view of that same area?

A. That is a lateral view of the same area and you see it brings it out more in detail. You see the normal width of the body of this, the normal width here, and here and you see this one is compressed anteriorly, and you also see nature's attempt at spurring and lipping, you notice further down. I felt like this was due to the fact that the lipping was present. There is no question that this man has had a compression of the ninth dorsal vertebra, but now the length of time that elapsed between the injury and the

time this picture was taken, as noted by these spurs, led me to believe that it was from an old injury, because it takes so long for spurs to form.

Q. Now doctor, I will ask you if that injury that resulted in the flattening of that ninth dorsal vertebra, if that had occurred January 16th, 1952, to the extent that it is shown there, could it have been a matter of days or weeks before that man knew that he had any injury back there?

A. Oh that's—that pain is usually intense.

Q. Would he have known it immediately?

A. Yes.

Q. Would he have been immediately disabled?

A. I would consider he would be.

Q. I believe there is one other—will you let me have a [fol. 353] picture made in November?

Mr. Gallagher: Which one?

Mr. Smith: Any picture of the——

Mr. Gallagher: Dorsal area?

Mr. Smith: Lumbar, made in November.

Mr. Gallagher: There is your dorsal.

Q. Here is a picture that was taken on November 19th of this year.

A. That is the same thing.

Q. I will ask you, doctor, to observe that and state in your opinion whether there is any change from the time—from the pictures just noted, taken on February 12th, 1952?

A. These same spurs or lipping like here on this, flattening of the ninth dorsal.

Q. Can you state whether or not the arthritic processes have grown any?

A. They seem to be a little more pronounced than the previous one. This is a little clearer picture too.

Q. I show you Plaintiff's Exhibit Number 11, dated 11-19-52. It is of the lumbar area. Do you find any more lipping, any more evidence of arthritis than showed up before?

A. Just about the same. I see no change at all in this.

Q. That is of the lumbar?

Mr. Gallagher: I think that is right, yes, sir.

Q. All right, doctor, have your seat. (Doctor Dunn taking witness stand.) Doctor Dunn, I will ask you to [fol. 354] please state what treatment you advised, or gave to Mr. Arnold when he was under your care.

A. As stated above we gave him physiotherapy in the form of diathermy. We gave him injections of serum for his arthritis, and I wrote the superintendent and the master mechanic down there and advised that if they had any kind of work whereby he wouldn't have to bend over so much, such as car inspection, the way I understood his job was more or less checking for hot boxes and things like that, which required bending over a lot, and if they had any different type of work I would advise that he be given that type of job, and one of the reasons I sent him to Topeka was that if their orthopedic surgeon up there had any further advice as to his treatment why I would like to have it, liked to have had it, and they didn't have. They said they would just continue what we were doing, so that's what we did.

Q. I believe you stated before, after January 1st, 1953, when was the next time you treated him?

A. We treated him at weekly intervals for nearly a year, a little over a year. Sometimes he would go longer than a week, particularly when he was up in the hospital at Topeka.

Q. Was there any change in his symptoms during that time?

A. Well, they'd get better, and he would go and try to work and would come back complaining of his back and so I felt like he should try to do some other type of work [fol. 355] other than the job he was doing.

Q. Now, Dr. Dunn, in 1954, did you see him?

A. Yes, he came in with an infectious hepatitis.

Q. About when was that, do you remember, doctor, about when that was he came in with that?

A. Yes, sir, that was in February, the latter part of February he came in with the jaundice, yellow jaundice, and he was really on the gold standard, he was as yellow as a pumpkin. This had nothing to do with the arthritis in my opinion at all. It was just the same kind of thing, we call it Weil's disease. It is a virus infection.

Q. Could it have been caused by trauma or injury?

A. Oh, no, it couldn't have been caused by that at all. It is an infectious thing.

Q. Did you send him to Topeka when he had that?

A. Yes. I told him to go on back up there.

Q. And after he came back from Topeka did he come back to see you?

A. I don't recall, I believe he did a few times.

Q. And did you release him from work after that day?

A. Well, I told him to go on back to work and try to find something that he could do that wouldn't require bending over and straightening up so often.

Q. Doctor, from all of the time—all of your experience in [fol. 356] treating him and your findings, and physical examination you made and X-rays as you have seen them here today, did you find anything, or what is your opinion now as to whether or not Mr. Arnold is now suffering from anything caused by injury on January 16th, 1952?

A. Mr. Smith, I don't know whether you have my report that I have made, in my summation of his condition which I gave to his employers, I felt like that this injury caused an aggravation of an old chronic process.

Q. What was the old chronic process?

A. Well, he had an arthritis unquestionably, he had that, and I felt like that this injury was an aggravation of the same condition, probably two—years ago, and naturally I felt like that any type of work what would aggravate the thing should be eliminated. Now as far as—and I state again, I felt like, in all fairness to him and the company this injury he had had aggravated a chonic condition and that he probably would get back to what we call status quo, the way he was probably before this recently injury, because unquestionably he has had arthritis for years, it probably followed the old injury in my opinion.

Q. Doctor, let me ask you this: how long, for what period of time would you reasonably expect any aggravation of those pre-existing conditions to continue?

A. You can not state just exactly how long this would take. I would say possibly a year or eighteen [fol. 357] months.

Mr. Smith: I pass the witness.

Mr. Cobb: No questions.

Cross-examination.

By Mr. Gallagher:

Q. Dr. Dunn speaking of legs, is there just as much legs there as there ever was? You say one is shorter than the other?

A. He walks with a decided limp, and he has a history of having had his shoes raised on the right side.

Q. Well, this question, one at a time, when you say one leg is shorter than the other, there is only one way you can shorten a leg, isn't it, and that is to have a bone overlap, physically shorten a leg.

A. That's right.

Q. And that bone is the femur?

A. Not necessarily, the tibia could be shortened.

Q. You have two bones down in your lower leg, the tibia and fibula, don't you? If you break both of them and there is an overlap there may be a shortening of that leg?

A. If you break one of them, the large bone and get a slight shortening, due to the fact that the other will bow out some.

Q. Did you X-ray his lower leg?

A. I told you that he refused, I believe that you refused to let me X-ray it.

Q. You say I did?

[fol. 358] A. Well, his attorney, I didn't know who his attorney was.

Q. I am his attorney.

A. Well, Mr. Arnold told me when I wanted to X-ray him that his attorney said that he didn't want any X-rays made so I didn't take them.

Q. He has enough to paper a wall already, but doctor, be that as it may, can you produce the same effect of an apparent shortening of a leg by a tilting of the pelvis?

A. Yes.

Q. If a man is suffering in his low back and he is favoring that by drawing such like, it will have the appearance of shortening a leg, won't it?

A. Yes.

Q. And so, if he has his lower back hurt, as this evidence

shows and favors it in getting around so he won't hurt so badly, and so long, and so much, that would produce the same physical appearance as if one leg were shorter physically than the other wouldn't it?

A. It could.

Q. Did you measure his leg?

A. No.

Q. Doctor, I believe you find trouble without now stating its origin, in the neck, on the sixth neck vertebra, cervical vertebra, is that right?

A. Found it in the X-ray. He never complained of neck [fol. 359] pain to me.

Q. I say you found that in the X-ray?

A. In the X-ray, yes.

Q. He never told you his neck hurt him?

A. Or the upper part of his chest either.

Q. You found the ninth dorsal or thoracic vertebra mashed in a wedge shape?

A. In the X-ray, yes.

Q. You found that?

A. Yes.

Q. And you found the space between the top of the sacrum and the bottom of the fifth, to the rear, that space physically lessened?

A. Yes. He has spondylolisthesis.

Q. That word, I never can pronounce it, but just say that word.

A. Yes.

Q. It may be produced by injury as well as from other causes, may it not?

A. Yes.

Q. And in fact of the business that is a slipping forward of the fifth lumbar vertebra laterally across a small way, the top of the sacrum, or backwards?

A. No, it is an increase in the angle between the anterior portion of the first sacral and the anterior portion of the fifth lumbar. It may be produced somewhat by that, but in this particular case you will find that the posterior por- [fol. 360] tion of the fifth lumbar and the first sacral is the same. This was due—this is an increase you might say, here is L-5 and S-1. That is a widening of the angle here, is widened, the posterior portions, I think if you will put

the pictures back on the screen I will show you they are practically the same.

Q. I will be glad to. (Witness looking at X-rays.)

A. See, there they are. The angle here, here is the spondylolisthesis. This is narrower here, it is true, but, you see, there is a normal cantilever principal, if you didn't have that it wouldn't absorb some of the jolts. You see there is a bowing there natural in everyone's back and see here, the posterior portions of these are practically the same. Here you can see—of course, you have got to—you are looking through the hip bone, the ilium too which obscures it somewhat, but you see right there the posterior part here is practically in line, taking into consideration the natural bowing of the back, which is increased here due to the spondylolisthesis.

Q. All right, doctor, while we are on the subject, you say in between there, where my pencil point is, is cartilege?

A. Yes.

Q. And that is supposed to be springy?

A. Yes, it has a soft spongy center and hard outer surface.

Q. But you can take a sponge, can't you and squeeze it down so it is hard?

[fol. 361] A. Yes.

Q. Now if a man hits on top of his head or his shoulders, like in a fall on his shoulders that force is transmitted all along his spinal column, isn't it?

A. Just like a bunch of dominoes.

Q. Yes, sir. And when you hit the top of the sacrum that is the brick wall that hits, isn't it?

A. When a movable object meets an immovable object.

Q. Yes. And that is where you get your compression is when the one stops——

A. Not necessarily.

Q. You can though, can't you?

A. Anywhere along there is possible, but you can catch it anywhere in the lumbar vertebra.

Q. And you might catch it right up here?

A. Yes.

Q. On this famous one right there?

A. Yes, I think that is what caused it, whether it was caused from this accident or the other is a moot question.

Q. Well, if it happened here, you would have to get some other accident, some other blow, some other force to explain it, unless it be that truck hitting him, that ought to be enough hadn't it?

A. Well if it was, my opinion is that the lipping was there at the time of this accident, which shows to have been trouble before.

[fol. 362] Q. Dr. Dunn, let's get back to the lipping, now I break my wrist, and nature will start to heal that by throwing down additional bone, calcium?

A. Additional cartilage and then the calcium becomes impregnated—the cartilage becomes impregnated with calcium, hardens and makes bone.

Q. You have a bone knitted together?

A. Yes, sir.

Q. Now if you put down—if you damage a vertebra such as the ninth to be very specific, and then you—everytime you damage a thing like a bone, nature, in its wonder work will try to heal that over?

A. Yes.

Q. And if he damaged the body of that vertebra like it is claimed, by that truck, and breaks the periosteum or covering of the bone, and then nature puts down over that wound, like it puts down on a broken arm, it will create the appearance of bone being added to, or built up on it, won't it?

A. Yes.

Q. And that would look a good bit like the same thing as this you are calling arthritic deposits?

A. Well, the time element would have to be taken into consideration. These pictures, I understand, were made 14 days after the accident and there would hardly be enough time there for the osteophytes to form to where they would show in an X-ray with the same intensity as those [fol. 363] show.

Q. Some would form?

A. Well there wouldn't be—you see, the calcium would be there but they haven't become impregnated with lime salts to where it would show in the X-ray in that length of time. It takes five weeks for that to show.

Q. If it is arthritis, is there must increase in the last three years on that?

A. The pictures that you showed there show that very definitely and showed very little, if any, increase at all in the lipping on the ninth. That is the site you are speaking of.

Q. If it takes six weeks to heal that broken finger——

A. It doesn't heal perfectly within six weeks, but for practical purposes it would take six weeks.

Q. And you put out quite a bit of bone in six weeks?

A. Different bones put out with different speed.

Q. Then, you would have to trace the mashing of that vertebra back six or seven weeks, before he got hurt, if he had something happen to him before he was hit with the truck?

A. Well, the time element there, you couldn't say exactly when it was.

Q. You can't look at a scar and tell how old it is, can you?

A. Yes, a scar you can, because if it is red it is recent and if it is white you know that nature has more or less taken that redness out. Now some different individuals, like in brunettes, they don't show scars as bad as [fol. 364] blondes.

Q. That scar on my hand, you can't look at that and tell me when I got that, can you, within ten years?

A. I would say it has been quite awhile ago because the redness has disappeared and the whiteness has shown up.

Q. Can you tell me about when I got that finger cut?

A. I am not that much of a clairvoyant.

Q. Doctor, in those three areas, without theorizing where it came from or where it went, if a man would come to you, as a medical man, with that arthritis, call it arthritis, if you like, I don't care, and with that neck trouble, be it whatever value or amount it is, and that center of the back trouble, and the low back trouble, and the hand for that matter, group them all together, and then you would add to that picture, please sir, this man has been compelled to be inside his house, away from work, or in the Santa Fe Hospital up there for as much as at least 16 months out of the last three years. He would come back and start to work a little bit and just peter out, as we say, play out, and then go back again, if he would come to you with a

page like that, would you pass him for any kind of employment having to do with work, exercise, lifting, stooping?

A. You mean knowing all of these——

Q. Yes, having all of those things before you.

A. No, I wouldn't.

Q. So this man, the only work he knows is labor, physical [fol. 365] labor, in a particular department, the railroad car inspection department, you wouldn't pass him for that work, would you, full duty in his condition?

A. No, I wouldn't.

Q. Now, without prolonging the questioning, that mashed vertebra in the middle of his back will stay the way it is as long as he lives won't it?

A. It has been there several years, I see no reason why it wouldn't stay there.

Q. Well, that is your opinion?

A. That is my opinion. You asked for my opinion.

Q. Well, we may sharply contest that issue because there is no other explanation for it, in all your histories.

A. Other than the previous accident he had.

Q. That was his ankle that he broke before, not his back at all, you understand that don't you?

A. Well I thought he——

Mr. Cobb: If the Court please, that is not the evidence here. It was a leg.

Mr. Gallagher: Above the ankle, the tibia and fibula, the one bone right above the ankle.

The Court: I am not sure what it is.

Mr. Gallagher: There is no other evidence.

The Court: All right.

Q. He just broke his leg in 1926, and so the only explanation there is for that, do you know of any other in all of [fol. 366] your histories?

A. If it were not the history of previous accident sometime in his past, which is bound to have been—he couldn't have the lipping present in the 14 or 16 days elapsing from the time of the accident until the pictures were made. I am forced to conclude that something happened in the past to cause such a condition. I can not—I can not flat-footed say that this man did not have an injury. I know he had

an injury at this time because I know—I didn't consider him a malingerer, but I felt that the past history had as much to do with his present condition, I felt like that this present condition aggravated an old arthritic condition. I am forced to conclude that, because those spurs denote that he has had arthritis for years, and I feel that this present injury aggravated an old chronic condition. Now that is my honest opinion. I do not feel that he was a malingerer, but I felt like that the old arthritic condition was aggravated, and I so made the statement to the railroad, and requesting that he—there is no reason why he couldn't do lots of jobs around the railroad now, and I told him so, and I wrote Mr. Fertig, and also Mr. Waggoner, advising that he be put back on the job, in a position where he would not have to bend over and straighten up and bend over, looking at the hot boxes. Why he could do checking, he could do a lot of things around a railroad. They didn't seem to [fol. 367] have anything of that nature in this railroad business, it seems that somebody gets bumped that seniority carries more weight then anything else, so I couldn't dictate to the railroad what to do.

Q. Doctor, there isn't any work, when you get down to work, where you don't use your back is there?

A. Oh yes, you don't use your back to the extent that a man does when he inspects hot boxes.

Q. Or climb up over cars and things like that you use your back?

A. Counsel, I advised against him climbing up over cars. I told them to put him on a job where he wouldn't have to do a lot of that, but there is a lot of work that he could do.

Q. Do you know of any job where he could take a tack hammer and just go around that way?

A. Yes, hanging paper.

Q. Hanging paper?

A. Yes, sir.

Q. You have to work over your head when you do that, don't you?

A. Sometimes, now——

Q. He says he can't do that, now what?

A. I haven't checked him out on that.

Q. I will ask you whether or not there is more spurring or appearance of spurring on the ninth than any other body in that picture?

A. The anterior border, the upper anterior border of the ninth and the eighth appear to have the same amount of [fol. 368] spurring here and here, (witness indicating) the upper anterior border of the tenth, and the lower border, anterior border of the ninth appear to have practically the same amount of spurring so you would have to take a micromic caliper to find out exactly. To the naked eye it appears to be exactly the same on both vertebrae.

Q. Now let me ask you this, you see, when this man fell, the truck hit him and he was knocked 12 feet, or some such figure, and he landed on his right elbow and hand and left shoulder, jackknifed forward like that, forward, and with enough force that it busted the knees out of his breeches, whether that was done by friction, or whether it was done by force I don't know. It mashed, it may mash the upper, the eighth against the top of the ninth, and the bottom of the ninth against the top of the tenth, now don't you believe that that being cancellous, or spongy bone, that very blow may have involved all of the borders that I talk about, in that one same crushing devastating injury?

A. That isn't spongy bone here. The spongy bone is inside these. That is tough. That is about as tough a portion of the bone, the anterior border, you know in spareribs and backbone, you know it is tough. This immediate portion of the bone is spongy.

Q. Make it as hard as you want to, it was a hard blow, don't you think it could damage the periosteum sufficiently that that may start growing from here and here, and from here, all as a result of this one same identical injury?

[fol. 369] A. There is no question, Counsel, but what this is a compression fracture of the body of the ninth vertebra. There is no question but what an injury caused the damage. The question is now when did this injury occur? Was it old or was it recent? There is no question of the compression fracture, in my opinion, this has been there quite a long time, as noted by the fact that the film made 14 or 16 days after the injury shows the same lipping that's showing there now two years later.

Q. Whenever there is lipping, and confine it to one, two or three bodies, and it is not prevalent over the spine, isn't that usually of injury origin?

A. I am not saying it wasn't an injury. I am saying unequivocally that this is a compression fracture of the body, I have run across cow punchers that have had the same thing and we X-rayed them for something else, and asked them did they ever get hurt, and they say, "well, a horse threw me one time several years ago, and I didn't pay much attention, I had the backache for awhile——"

Q. A person may compress a vertebra and still walk around——.

A. That's right.

Q. So, there is no reason why a man that would get that would have to crawl in bed right away?

A. Well, there is a good deal of pain connected with it.

Q. He has had a good deal of pain hasn't he?

A. Well, yes, he's had pain.

Q. I hand you two or three photostatic copies of your reports, and you may look at all of them, and after you [fol. 370] examine them I will ask you a question. (Witness looking at reports.) Every one of those reports has in it—by the way, they are reports to the company, aren't they?

A. No, no, these are reports to the Insurance Company, but they are in line with what I reported to the company.

Q. Every one contains a back injury?

A. Yes, sir.

Q. And every one centers it on one date, January 16, 1952, that is contained in the report?

A. That is the history he gave me as to the time of the injury.

Q. And you had no reason to doubt it?

A. I didn't know that he had ever had any other injury at that time.

Mr. Gallagher: Nobody knows it yet, if there is one. That is all.

The Court: Any further questions?

Mr. Smith: That is all.

Mr. Cobb: Let me ask one or two questions.

The Court: All right.

Redirect examination.

By Mr. Cobb:

Q. Doctor, can you tell from looking at an X-ray how much a man hurts?

A. No, just like looking at a man's shoe, you can't tell where it pinches.

[fol. 371] Q. And you have to rely largely on what the man tells you himself?

A. Yes.

Q. What kind of an examination do you doctors call that, when you rely on what a man tells you?

A. Those are subjective symptoms.

Q. In other words, a history of his complaints?

A. Yes, sir.

Q. And what he says hurts him at that particular time?

A. Yes, sir.

Q. Did you base your opinion on Mr. Arnold's condition on what he told you very largely?

A. I based it on both.

Mr. Cobb: On both. That is all.

Recross-examination.

By Mr. Gallagher:

Q. I believe you said that you found Mr. Arnold a very cooperative patient?

A. Yes, in every way.

Mr. Gallagher: That is all.

Mr. Smith: Thank you, doctor.

The Court: All right. You may step aside.

[fol. 372] Joe T. Stone, having been first duly sworn testified on direct examination by Mr. Smith as follows:

Q. State your name, please.

A. Joe T. Stone.

Q. State your name Mr. Stone, your full name.

A. Joe Travis Stone.

Q. Where do you live, Joe?
A. Pampa, Texas.
Q. How long have you lived up there?
A. Three years.
Q. Did you formerly live in Lubbock?
A. Yes, at one time.
Q. Were you living in Lubbock in 1952?
A. Yes, I was.
Q. How long did you live around Lubbock?
A. Off and on for 18 years.
Q. I direct your attention to January 16, 1952, who were you working for on that date?
A. I believe, Mr. Billings.
Q. Is that Raymond Billings, sitting in the Court Room?
A. Yes, sir.
Q. What were you doing for him on that date?
A. I was beginning as trucker's helper.
Q. I mean in January, 1952, what were you doing for him?
[fol. 373] A. I was hauling mail.
Q. Driving a truck for him?
A. Yes, I was.
Q. And do you recall on that date that there was some sort of an accident occurred?
A. Yes, I had taken this truck down to the railroad after a load of mail.
Q. Now where did you take the truck to?
A. Down at the railroad.
Q. Santa Fe Railway?
A. Yes, sir.
Q. Mr. Stone, I will just ask you first to step over here and look at this diagram on the board, the blackboard, does this fairly well represent the driveway that you used on that morning to go in and get some mail in your truck?
A. Yes, it does.
Q. With these as the baggage cars?
A. Yes.
Q. And to the West there was the driveway that you used?
A. It was.
Q. How did you get in to that area?
A. I pulled in from this way, pulled in forward.

Q. Pulled into what car, the middle car?

A. The middle car.

Q. And from which car did you load your mail?

[fol. 374] A. I unloaded—that is, the boys handed the mail to me, a few sacks out of the front door of this car that morning and then I came back to the second door and finished up my loading.

Q. By the second door you mean this one furtherest south?

A. Yes, the second door there.

Q. At that time how long had you been driving a truck for Mr. Billings?

A. Approximately two years.

Q. Had you used that same area many times before that date?

A. Yes, I have.

Q. Was it or not a one-way drive according to your instructions?

A. Yes, sir, it was a one-way drive.

Q. Were you permitted to pull all the way through there forward?

A. Never have.

Q. And go out North?

A. Never have pulled up in front of the depot at all.

Q. What were your instructions in regard to that?

A. On account of the pedestrians they would not allow trucks to go through there at all.

Q. Did you ordinarily drive in forward and back out after you loaded your truck?

A. Yes.

Q. Is that what you did on this morning January 16th, 1952?

A. Yes.

[fol. 375] Q. Do you know Mr. Harry T. Arnold?

A. I do remember him, not exactly the man at that time. I remember the man.

Q. I will ask you to tell the Jury, Joe, just what you did from the time that you finished loading that truck that morning until you first had some indication that something was wrong.

A. Well, I had loaded my truck, and I had secured the back end of it with the tail-gate of the truck. I usually

fastened it just like they do now, this tail gate had been sloping just a little bit I will say and I had a ducking over the back of it and had it secured on both sides to keep from losing the mail and then I got back into the truck at that time——

Q. Now, at that time had you—let me interrupt you there—had you seen Mr. Harry T. Arnold in that area at all?

A. I hadn't seen anyone except two men that handed me the mail out of the car that morning.

Q. Did those men get out of that car down in that driveway at any time?

A. No.

Q. Now at the time you went to get into your truck, I will ask you whether or not you looked to see whether there was any one in that particular side——

A. Yes, sir, I had a clear view from all sides and around it, and every time I secured my rope I would kick my tires to see if they were all up, or not, and then I would go [fol. 376] around and get into the truck——

Q. At that time I will ask you to state how your truck was situated with reference to rear view mirrors, did it have them?

A. Well the rear view mirror was the only thing that I had to back up with.

Q. On which side did you have rear view mirrors?

A. On the left and right.

Q. And how big were those mirrors?

A. They were good sized mirrors, I would say about like the round part of this mike here.

Q. Were they stationary or did they flop around.

A. Yes, they was very muchly stationary, where they would not move, and if you happened to run into anything, it would knock them off.

Q. As you started to pull backwards that morning, did you look into those rear view mirrows or not?

A. Yes, sir, I did. I looked into the left view mirror and the right one both, at all times as I was backing this truck.

Q. Did you see anything to the rear at all as you started back?

A. No, I didn't see anything at all until after I started the backing up and then I happened to notice in the left

view mirror and seen a little object go across the left view mirror and I just——

Q. What did you do then?

[fol. 377] A. I thought it was a mail sack and I immediately stopped. I didn't want to run over the mail sack and I immediately stopped and left the truck in gear, cut the ignition off, pulled the emergency brake back and got out and found a man lying out about two feet of my left dual wheels.

Q. I will ask you to step over there to that diagram and show just about where that truck was when you stopped it, if you remember? Taking this as the area where you drove.

A. Well, this here is where I unloaded the mail. Here is the door right here and the back of this truck hadn't much more than got to the back of this mail car, which the two mail cars are together and right out here is where, about two foot of the line, is where I found this man.

Q. Was it Harry T. Arnold, or do you know?

A. Yes, this man sitting here with the blue suit on.

Q. With reference to your left wheel, where was he?

A. He was out to one side of the truck, he had already cleared the right-of-way, he was out on the grass.

Q. Was he forward from your rear duals, or back of them or even with them?

A. Just as soon as I seen the man I went over to pick him up, and he mumbled something and I let him alone. I thought he could get up, if he could at all, and I looked at the back of my mail to see if it was still secured, and it was, so when I got back by that time Mr. Arnold was holding his hand like that, and I asked him did it break [fol. 378] his hand.

Q. Was he standing up at that time?

A. Yes.

Q. Just take your seat (witness taking witness stand). What did you ask him as you recall, when you first spoke to him?

A. Pardon, sir?

Q. What was your first question you asked Mr. Arnold if you recall?

A. I asked him was he hurt.

Q. What did he say?

A. He mumbled something to me but I don't recall just

what he said. He mumbled something to me and then he had his hand, his arm up on his right arm and I asked him if he could wiggle his fingers and he wiggled his fingers.

Q. Did he walk around then?

A. Yes, sir, he did.

Q. Did he tell you what had happened to him?

A. Yes.

Q. What did he say?

A. He was—he said that I had backed into him and I just said I was sorry.

Q. Did he tell you what portions of his body had been struck by that truck?

A. Nothing.

Q. He didn't tell you?

[fol. 379] A. No.

Q. Did he walk away from that area while you were there?

A. Yes, sir, he had started toward the depot.

Q. Now Mr. Stone, I will ask you to think very carefully, and tell the Court and Jury just how fast you were backing that truck, as you can best recall, at the time you saw that object in that left rear view mirror, and just before?

A. Well, I had started the motor in gear at approximately three miles an hour, if I was going that fast.

Q. Were you speeding at all backwards?

A. No, I wasn't. I just had pulled backwards and was very slowly coming out, on account of it is an awful tight place.

Mr. Gallagher: Awful what.

A. Tight place.

Q. Did you have room on either side to maneuver that truck if you didn't come out straight?

A. Yes, sir.

Q. How much room on either side did you have?

A. Approximately two feet or more.

Q. Now could you back that truck out of there at a high rate of speed?

A. No, not too high rate of speed.

Q. Did you ever back it out of there as fast as ten or fifteen miles an hour?

A. No. And I don't think anybody else could.

[fol. 380] Q. Now you had been using that one-way drive there I believe you said approximately two years?

A. Yes.

Q. During all that time had you received instructions from Mr. Billings about how you should operate in that area?

A. I had.

Q. What were those instructions?

A. To be very cautious at all times and to bring that mail and keep it rolling.

Q. Had he told you, cautioned you about looking before you backed?

A. Yes, he had.

Q. Did you look before you backed?

A. Yes, I looked at all times, any time I got in that truck I looked at all times for pedestrians or anyone else.

Q. Now Joe, I would like for you to look at this picture marked Defendant's Exhibit Number 2. Look at that truck and state whether or not that appears to be a picture of the truck you drove that day?

A. Yes, sir, it is.

Q. Had you at any time in backing out of there run into those box cars and knocked the hand holds down?

A. No, sir.

Q. Did you ever touch one of them?

A. No, sir.

[fol. 381] Q. Did you on this morning?

A. No, sir, I didn't.

Q. What did you do after Mr. Arnold left that scene?

A. I backed out very slowly and taken the mail on over to the annex and loaded it and as soon as I got through unloading it I went to Mr. Billings with the story.

Q. Did you tell him what had happened?

A. I told him everything I possibly could remember.

Q. Did you see Mr. Arnold after that?

A. Not until the next day.

Q. Did you talk to him the next day?

A. No, sir.

Q. Did you see him working around there the next day?

A. No, sir.

Q. Could you tell there was anything wrong with him?

A. No, not that I can recall.

Q. You didn't ask him, and he didn't tell you?

A. No.

Q. On this morning there after he got up off of the grass out there, did you notice whether or not the knees of his trousers were busted out?

A. No, sir, I didn't.

Q. Well, did you have any recollection as to whether they were or weren't?

Mr. Gallagher: He answered he didn't notice.

[fol. 382] Q. Well I just wanted to be sure I understand the answer. You did not notice, is that your answer?

A. No, I didn't notice.

Q. Did you notice anything else about Mr. Arnold's clothing that indicated anything to you?

A. No, sir.

Q. Any dirt upon his clothing in any particular place, or do you remember?

A. Nothing, only he had blue jeans on is the only thing I recall he had on.

Q. Did he have on any sort of coat or jacket?

A. He had a jumper on.

Q. Is that a blue jumper?

A. A blue jumper with overalls, I believe.

Q. Now, did you ever work for the Santa Fe Railway or any other railway company?

A. No, sir.

Q. Did you know anything on January 16th, 1952, about what a blue flag on a car meant?

A. No, I never noticed it.

Q. Had you ever been instructed about any such thing as a blue flag?

A. No, sir.

Q. Now Joe, were your brakes in good shape or not that morning?

A. At all times.

[fol. 383] Q. Did you have any trouble stopping that truck at all that day?

A. No, sir.

Q. Was there anything else mechanically wrong with that truck?

A. No, sir, there wasn't a thing in the world wrong with it.

Q. Did you have a commercial operator's license?

A. At that moment I did have.

Q. How much longer did you work for Raymond Billings after this occurrence?

A. Approximately three or four weeks.

Q. Did you leave there voluntarily?

A. Yes, I did. I left there to go back into service and I am in the reserves at the moment.

Q. You are not a party to this suit, are you Joe? You haven't been sued in this case? You are not a party to it?

A. No.

Q. You have no interest in the outcome do you?

A. Nothing that I know of.

Mr. Smith: Pass the witness.

Cross-examination.

By Mr. Gallagher:

Q. Mr. Stone, where do you live now?

A. I live in Pampa, sir.

Q. Where?

A. Pampa, Texas.

Q. That is up in Grey County?

[fol. 384] A. Yes, sir.

Q. And what do you do up there?

A. I work for the City.

Q. The city of Pampa? In what capacity?

A. Cleaning streets, sir, with a broom.

Q. When you left the employ down here was there any particular reason you quit Mr. Billings?

A. No, sir, no particular reason.

Q. You worked for him two years and then three weeks after you hit this man?

A. Two years altogether, and three weeks after I hit him.

Q. You quit three weeks after you hit this man?

A. Yes.

Q. When you were out there that morning—by the way, you had three or four trucks hauling the mail didn't you?

A. Only one.

Q. Only one? Are you the only truck driver that ever went over there?

A. No, sir, I am not the only truck driver that ever went over there, I hadn't very often.

Q. You mean you had never driven a truck in front of the station?

A. No, sir.

Q. You don't know what the others had done?

A. I wasn't on the trucks.

Q. You were driving the big truck that morning?

[fol. 385] A. Yes, sir.

Q. When you were loading—now there has been—you say there were two men pitching the mail out to you?

A. Yes, sir, and there have been several.

Q. On this occasion?

A. Yes.

Q. Not five?

A. No.

Q. Are you sure of that?

A. There was only two that morning.

Q. Just two?

A. Yes.

Q. And if somebody else said five they are wrong, is that right?

A. Sir, there was only two men.

Q. I say if there were five men pitching the mail out the morning in question, that day that would be wrong?

A. I suppose it would.

Q. When you were loading your truck did you see Mr. Arnold come through that car?

A. No, sir.

Q. In the course of his work there? You didn't see—he didn't come through the car you were unloading?

A. No, sir, he sure didn't.

Q. When you got the truck loaded did you jump down [fol. 386] from the truck to the ground?

A. After securing the load, yes I did.

Q. You say you looked down South, looking for people?

A. At all times.

Q. You did know that it was necessary that people were working around those cars, inspectors?

A. Well, at times.

Q. And they were apt to come in and out of those cars at any time while you were there, you knew that didn't you?

A. Yes, sir.

Q. And they work up and down the sides of those cars, you knew that didn't you?

A. Yes, sir.

Q. And you never saw Mr. Arnold that morning at all, is that right, until you hit him?

A. No, sir.

Q. Did you, when you got down off of the rear of the truck, you say you took a look South?

A. Took a look South, North and all around.

Q. What did you look North for?

A. Pedestrians walking up in front of my truck.

Q. You weren't going North, what did you look North for?

A. Just happened to look North, that is all, I was very precautious at all times.

Q. You were so careful that you looked North when you [fol. 387] were going South.

A. Yes, sir.

Q. And then you went around kicking the tires?

A. That's right.

Q. Which one did you kick first?

A. The right duals.

Q. Kicked all four of them?

A. All four of them.

Q. They were all right? You looked where you were kicking.

A. That is where the road was.

Q. You looked where you were kicking on it?

A. Yes.

Q. The tires. Did you kick the front tires?

A. Yes, sir.

Q. Which one did you kick last?

A. The right front tire.

Q. The right front tire, and then you got in your cab?

A. That's right.

Q. Did you get in from the right or the left side?

A. I got in from the left side of the car.

Q. And then you started back right away?

A. Yes.

Q. Did nothing else?

A. Nothing else.

Q. That's all.

[fol. 388] A. That's all.

Q. And then did you pull up before you backed back?

A. No.

Q. Did you pull forward before you backed the truck back?

A. Sir, you had to pull the truck forward just a small bit, approximately a foot, maybe a foot and a half, to get away from the car, because the car was leaning into—the back of the truck was always leaning into the side of the car, in order to get close to the car. You pulled up just enough there in order to get away from the car.

Q. When you sat down behind the wheel, your rear view mirror wouldn't show anything but a car back of it would it?

A. Yes.

Q. A coach?

A. That is all.

Q. No visibility at all then?

A. There was clearance, two foot clearance.

Q. All you could see was the baggage car, because your truck was setting at an angle, is that right?

A. You could see the car in case if there wasn't any dust or any steam there.

Q. Well——

A. If it was clear you could see the car.

Q. All you could see, so you will know what I mean, when you look in your rear vision mirror that way, with your truck in that position, all you can see back of you is [fol. 389] that car? Car Number 1 there?

A. Yes, sir, but can I point out to you sir.

Q. Point out anything you want to.

A. This truck here was at this here door. This truck here was backed in at this here car here, and I always pull out just a little bit in order to get my clearance and then

I go back here and then I pull my flap down, fasten it on both sides, check my tires, get in the cah and come out.

Q. Yes, you told me that. Were you loading on this occasion from the second car there?

A. From the second car, right there where I was at.

Q. You were not up where that truck has the position up near car number 1, on the first door?

A. No, sir, that car that was there the morning when the train come in, and my truck was setting here when the train come in.

Q. Well, when you pulled up is what I am talking about, sir, so there is no mistake?

A. Yes.

Q. When you pulled up and backed backward, and then hit Arnold, did you pull up from that car number 2 door right there?

A. No.

Q. Or up here?

A. I was setting here at this door, and I pulled up just enough to get away from the car, for clearance of my right view mirror where it would be clearance at all times so I [fol. 390] could back up with precaution, with both mirrors.

Q. In other words, there was a full baggage car ahead of you that you weren't even near?

A. This one right here.

Q. Yes.

A. My truck was setting right here the morning when the train come in, I was early for the train and I pulled up right here and my truck set right there and I would at all times go in here to warm, inside the depot here, and these two cars had never got here from Sweetwater that morning.

Q. Well, now when you hit—backed into Mr. Arnold over here, you say that your car was backed from the position next to coach number 2, is that right?

A. No, sir. This car was setting there the morning before the train come in. These two cars here had come in on that morning train. With my truck setting here these two cars come in on the side line and they were positioned there. There was only two men come down to the cars

and by the time they got down, while they was coming down, I backed from here down there and there was no one at all there. I unloaded a few sacks of mail out of this car down here, and I went on down to this car door, and there still wasn't no one around, and then I taken the mail out of this car here, pulled up a little, looked around to be precautious at all times, get in the truck, there wasn't [fol. 391] any one there, and started coming backwards approximately three miles an hour.

Q. In other words, you travelled about how many feet from the time you started back until the time you hit Mr. Arnold?

A. Approximately three or four feet.

Q. You backed your truck, is that what your testimony is, three or four feet?

A. That's right.

Q. And then you hit Mr. Arnold?

A. That I don't know.

Q. You started backing from a stopped position?

A. Yes.

Q. And backed three or four feet and hit Mr. Arnold?

A. Yes, sir.

Q. You are sure of that?

A. Positive.

Q. Was he the only one you hit down there, or could you be mistaken?

A. That's the only person I have ever hit at all.

Q. And going—going three or four feet, and going three miles an hour, wouldn't knock a man 12 feet would it?

A. It would not.

Q. Couldn't possibly, could it?

A. It would not.

Q. And what you told me you did is everything you did? [fol. 392] A. That's right.

Q. Before backing?

A. That's right.

Q. That means you didn't blow your horn?

A. I don't recall blowing my horn, no.

Mr. Gallagher: That's all.

Redirect examination.

By Mr. Cobb:

Q. Mr. Stone, had you had any previous truck driving experience before you went to work for Mr. Billings?

A. Yes, sir, in the army.

Q. How many years experience did you have in the army?

A. Approximately four years.

Q. Did you do anything else in the army?

A. Except jump.

Q. What do you mean by that?

A. Paratroopers.

Q. You were a Paratrooper?

A. Yes, sir.

Q. In this last World War?

A. Yes, I was.

Q. Where did you drive trucks in the army?

A. Canton, California, Richmond, California, 1942, '43 and '44.

Q. Was all of your truck driving experience in this country or did you go overseas?

A. I went overseas. I drove more overseas than I did [fol. 393] over here. I taken my training over here.

Mr. Cobb: That is all.

Mr. Gallagher: That is all.

The Court: Do you have any questions?

Mr. Smith: Yes, sir.

Further redirect examination.

By Mr. Smith:

Q. At the time you started backing there could you see to the rear through both your left and right mirrors?

A. Yes, they was both clear.

Q. Was it a clear day?

A. It was tolerable clear.

Mr. Smith: That's all.

Recross-examination.

By Mr. Gallagher:

Q. One question. When you look in either mirror, there is a blind spot back of you in the center of your truck, in the rear, isn't there, a spot you can't see with either mirror?

A. No, sir.

Q. You mean that a man standing at the center of that passageway there that you can see him by looking in either mirror and looking no other place?

A. Yes, sir, if a man was standing 50 foot behind the truck you could see the man.

Q. You said three feet awhile ago, how about three feet?

[fol. 394] A. Yes.

Q. You can see him if he is right in the middle back of it, you can see him in those mirrors?

A. Yes.

Q. And you had sideboards up on that truck, didn't you?

A. Yes.

Q. Sidings up?

A. Yes.

Q. With canvas over all of it?

A. Yes, sir.

Q. Stacked high with mail wasn't it?

A. Yes.

Q. Still you could see immediately back of your truck?

A. Yes, sir, that's right.

Mr. Gallagher: That's all.

Further redirect examination.

By Mr. Smith:

Q. If a man was up against the back of your truck could you see him through the mirror?

A. No, not if he was right up against the truck.

Mr. Smith: That's all.

Mr. Gallagher: That's all.

The Court: You may step down. Call your next witness.

Mr. Smith: At this time I want to offer certain portions of the Deposition of H. T. Arnold.

Mr. Bean: Which Deposition, or both?

[fol. 395] Mr. Smith: Both of them. First we will start with this little one, page 16.

Mr. Gallagher: I will make the objection that offering the deposition of a man that has already testified in person, covering the same points already covered, if it does cover the same points, would be repetitious. The man has testified in person and has been cross examined on every score possible.

Mr. Smith: I am offering it for impeachment.

The Court: All right, proceed. I will overrule the objection.

Mr. Gallagher: Note our exception.

Mr. Smith: Page 16, about the middle of the page. I will go a little higher on page 16.

(Portion of Deposition read by Mr. Smith as follows:)

"Was that the time you saw the doctors in Dallas; that February the 2nd?"

"Yes, sir."

"That's the only time you've consulted them, or been treated by them, or——"

Mr. Smith: Incidently I want to show that this Deposition was taken April the 21st, 1954. (Mr. Smith reading.)

Answer: "That's right".

Question: "Now, at that time, had your back starting hurting?"

Answer: "Yes, sir."

Question: "When did it start hurting?"

[fol. 396] Answer: "Approximately two or three days after I got hit. Course it was sore at the time then but it just kept getting worse."

"So far as any noticeable pain in your back, it was two or three days later?" That's a question.

Answer: "Yeah. Oh I had a headache by evening after that happened but I never thought nothing about it. I just took for granted it was—just jarred up a little. The fact I really didn't think, at the time being, I's hurt much."

Mr. Smith: And then in the other deposition at page 29.

Mr. Cobb: If it please the Court, the defendant Pan-

handle & Santa Fe Railway Company joins in the offer of that particular testimony.

The Court: All right.

Mr. Smith: Page 29 in the other deposition, taken the same date April 21st, 1954, of Harry T. Arnold at the top of the page. (Mr. Smith reading from deposition:) Question: "Towards the south?"

Answer: "Southeast or east, and this truck came backing up there, unbeknownst to me, on account of the whiff of this air, and I was doing my regular work."

Mr. Smith: That is all of that that I offer.

Mr. Bean: We are going to object to offering part of an answer.

Mr. Smith: Well, I will read it all.

[fol. 397] The Court: Read it all.

(Mr. Smith reading from deposition.) "I had to inspect these cars as I go along, why it hit me, the end gate. I won't say positive that morning, but I do know it was—they generally have the end gate somewheres anglin there. They have chains here to hold it up to the truck, see, and it was sitting back anglin. I won't say it was 45 degrees but it was some degree. But this truck, as I was going along there, caught up with me. It was backing up and the end gate hit me right across my shoulders, and I don't know where it was, the corner of the truck or the tail light caught me on my lower back."

Mr. Smith: On page 28—move over to 28. (Mr. Smith reading from deposition.)

Question: "—what happened."

Mr. Smith: About two-thirds of the way down.

Answer: "I closed that valve there and I had to step back, oh three or four steps, back towards the depot, facing the depot, to get to this air drum here where I could open that valve which had to be drained, that reservoir tank had to be drained. I opened that valve and when I bent over, this truck was still sitting in that position."

Question: "You saw the truck then."

Answer: "I saw——"

Question: "Bent over to——".

Answer: "I saw the truck when I headed back up here

and bent over. I opened that valve and, of course, that [fol. 398] high air pressure on it, and the small valve, it whistled—you couldn't hear a thing. And there was some dust flew up from the ground because it was straight from the ground area, and I turned and went right back down this way."

"Which way are you walking now?"

"East."

Mr. Smith: That is all. We close, Your Honor,—I mean rest.

The Court: All right.

S. L. King, having been first duly sworn testified on direct examination by Mr. Gallagher as follows:

Q. Give us your full name.

A. S. L. King.

Q. You are a married man?

A. Yes, sir.

Q. You live here in town?

A. Yes, sir.

Q. How long have you lived here in Lubbock?

A. About 33 or four years.

Q. Do you conduct a business here?

A. Yes, sir.

Q. A cleaning and pressing business?

A. Yes, sir.

[fol. 399] Q. Have you ever—do you know Mr. Arnold back here?

A. Yes, sir.

Q. Have you ever lived next door neighbor to him?

A. About nine or ten years.

Q. What period of time was that?

A. About 1942 or '43 to 1952, to August, I sold out in August of '52 and moved away.

Q. Roughly nine or ten years?

A. Yes, sir.

Q. During the time you all were—how much distance was there between your home and his home?

A. Well, just next door, I was 2802 and he was 2804 First Street.

Q. Did you see him every day or so?
A. Yes, sir.
Q. I will ask you this question, please sir, before—all the time you were living out there, up to August 1952, no—before January, the middle of January 1952, before that time, before he got hurt, you know that period now, did you ever see him limp before he got hurt working for the railroad?
A. Not that I ever noticed. I never did notice it.
Q. Since he has been hurt at the railroad have you ever observed him limping or not?
A. Yes, sir.

Mr. Gallagher: That is all.

[fol. 400] Cross-examination.

By Mr. Cobb:

Q. Do you visit in Mr. Arnold's home and him in yours?
A. Yes, sir.
Q. Go to the same church?
A. No.
Q. Did you notice anything at all peculiar about Mr. Arnold's walk prior to 1952?
A. No.
Q. He walked perfectly normal, is that right?
A. Yes, sir.

Mr. Cobb: Pass the witness.
Mr. Smith: No questions.
The Court: What says the plaintiff?

H. T. Arnold (Recalled), having been heretofore duly sworn testified on further redirect examination by Mr. Gallagher as follows:

Q. Mr. Arnold you were sitting here in the Court Room and heard the truck driver Mr. Stone testify didn't you?
A. Yes, sir.
Q. Did you hear him, the truck driver say that immediately before you were hit his truck was backed up to, and unloading mail from car number 2?

A. I heard him say that, yes, sir.

[fol. 401] Q. Is that statement which he made in that respect correct?

A. No, sir.

Q. You are the one, as I recall, who placed the truck up at the North door, on the West side of car number 1, you drew that on there yourself?

A. Yes, sir.

Q. That is still true, is that correct?

A. That is correct, yes, sir.

Q. Two of your superiors testified here Mr. Fertig, and Mr. Culwell, testified. Were you present in the Court Room when they testified?

A. Yes, sir.

Q. Did you hear their testimony, and remember it, where they said you limped?

A. Yes, sir.

Q. I will ask you one question only, is that statement of theirs correct or mistaken?

A. They were mistaken.

Q. Have you ever limped?

A. No, sir.

Q. After say a few weeks or months, or a year after you got your leg broke in 1926, have you ever limped, before you got hurt at the railroad?

A. No.

Q. Now that injury you got back there in 1926, where [fol. 402] was that—what part of your leg was injured?

A. About there inches above my ankle.

Q. Was there a bone broken?

A. Yes, sir.

Q. Did it shorten your leg any?

A. No, sir.

Q. Did it ever affect any part of your body higher than your knee?

A. No, sir.

Q. The agent here testified that you had never reported to him, Pumphrey, or some name like that, Mr. Pumphrey, in regard to trucks, the Billings' trucks, the way they used the premises, and that it was dangerous, did you hear him make the statement, did you hear him do that?

A. I heard him make the statement.

Q. Do you believe that he was mistaken in his statement?

A. I know he is.

Mr. Gallagher: That is all.

The Court: Any further questions.

Recross-examination.

By Mr. Cobb:

Q. In other words, Mr. Arnold, Mr. Pumphrey is mistaken, and Mr. Culwell is mistaken, and Mr. Fertig is mistaken, all of those men are mistaken, is that right?

A. About the statements they made, yes.

Q. Concerning your limp and also the other?

[fol. 403] Mr. Cobb: All right.

The Court: Mr. Smith?

Mr. Smith: Yes.

Further recross-examination.

By Mr. Smith:

Q. Mr. Arnold, back in 1926 did you say you turned that car over or what happened at that time when you broke your leg?

A. It rolled over.

Q. It rolled over, and you were thrown violently about inside that car, wer-n't you?

A. No.

Q. Did you stay seated in your seat at all times?

A. No,

Q. You were thrown around wer-n't you?

A. No.

Q. You say then that that turning of the car, and rolling it over didn't bruise you about your body and throw you around any?

A. It just got my leg is all.

Q. Didn't throw you around in the car?

A. No, sir, it was a open car in them days, not like the cars today.

Q. Did any part of the car fall on you?

A. The door caught my leg.

Q. Did it throw you partially out of the car?

[fol. 404] A. Yes, sir.

Q. Mr. Arnold, I would like to ask you if Mr. Lemon and Mr. Townsend, the railroad employees that testified here yesterday, are they members of the same Union that you are a member of?

A. One of them is and one of them is not.

Q. Is he a member of another Union down there at the railroad?

A. No, sir.

Q. Which one is not?

A. Mr. Townsend don't belong to the Union.

Q. Which one does belong to the Union, Mr. Lemon?

A. Mr. Lemon, yes.

Mr. Smith: That's all.

Mr. Gallagher: Plaintiff closes.

The Court: What says the defendant, Santa Fe Railway?

Mr. Cobb: We close.

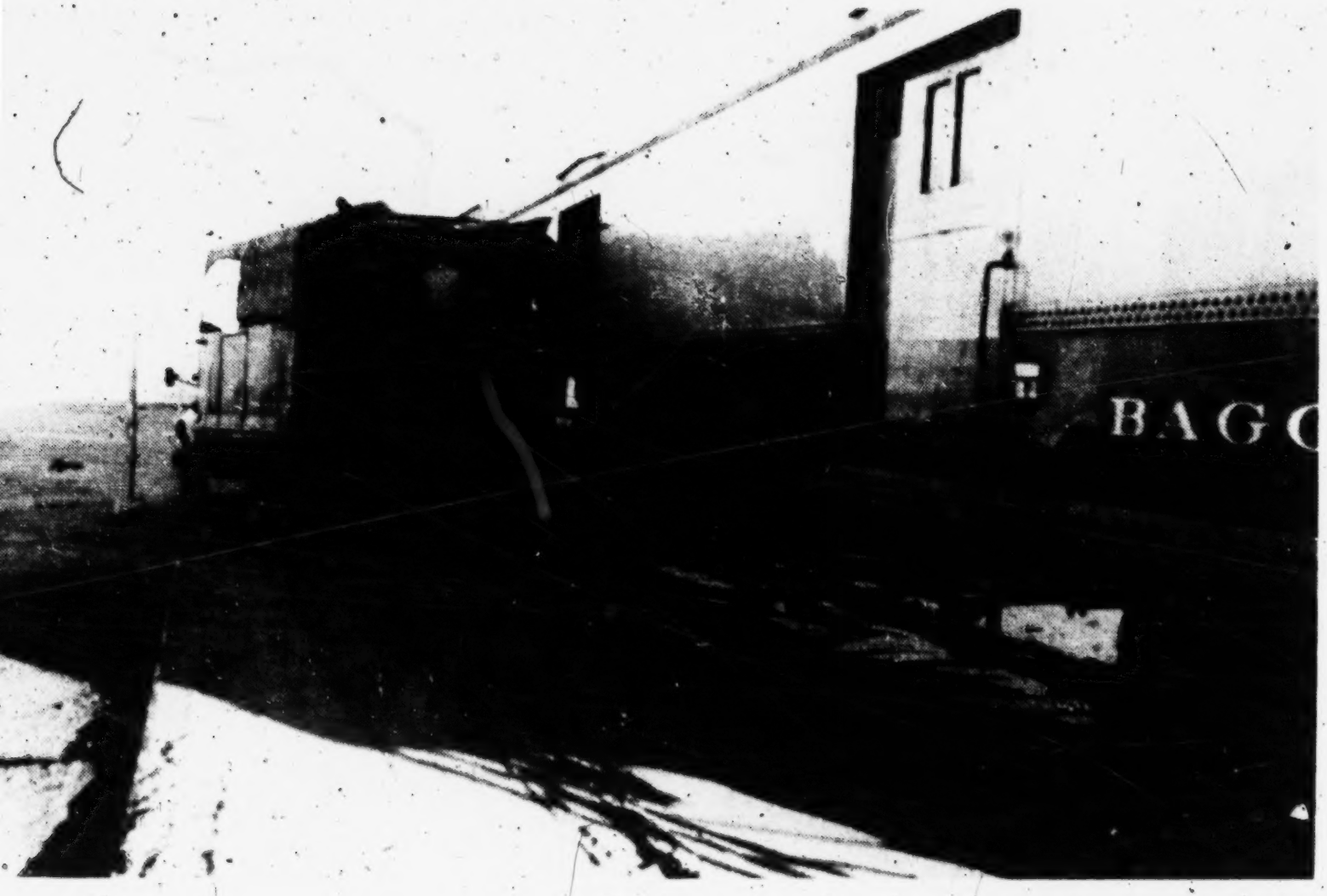
The Court: What says the defendant, Billings?

Mr. Smith: We close.

(Here follows 2 Exhibits, side folios 405, 406)

Exhibits D-1 & D-2

233A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Exhibits D-3 & D-4

2381

406

[fol. 407] Reporter's Certificate to foregoing transcript omitted in printing.

JUDGE'S APPROVAL OF RECORD

Approved and ordered filed as a part of the record in the above styled and numbered Cause, this the 19th day of April, 1955.

James G. Denton, Judge Presiding.

[fol. 407a] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

MOTION FOR INSTRUCTED VERDICT—Filed December 7, 1954

Comes now the Defendant Panhandle and Santa Fe Railway Company, and before the submission of the Court's main Charge to the Jury, and moves the Court to instruct the Jury to return a verdict in this case that the Plaintiff H. T. Arnold, take nothing as against the Panhandle and Santa Fe Railway Company, and likewise that Defendant Billings take nothing as against the Panhandle and Santa Fe Railway Company, for these reasons:

I

It is undisputed that H. T. Arnold, at the time and place of his alleged injuries, and with knowledge of the presence of the Billings truck, failed to keep a lookout for said truck, knowing at said time that it was present on the driveway. That such was negligence as a matter of law, and under the undisputed testimony in this case the actions of H. T. Arnold in failing to keep a proper lookout, were the proximate cause and the sole proximate cause of the injuries, if any, sustained by him.

Furthermore, the undisputed evidence in this case shows, as a matter of law, that this Defendant, Panhandle and Santa Fe Railway Company, was not guilty of any act

of active negligence, and no act of passive negligence has been proved in this case, as against it.

Whereof, Defendant prays the instruction of the Court.

McWhorter, Howard, Cobb & Johnson, Attorneys for Panhandle and Santa Fe Railway Company,
By: Charles L. Cobb.

[File endorsement omitted.]

[fol. 408] ORDER OVERRULING MOTION

The above and foregoing Motion for Instructed Verdict, having been submitted to the Court before the submission of the Court's main Charge to the Jury, and being considered by the Court, is in all things overruled, to which action of the Court the defendant in open Court excepted.

James G. Denton, Judge Presiding.

[File endorsement omitted.]

[fol. 409] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

REQUESTED ISSUES OF P&SF RAILWAY COMPANY—
Filed November 26, 1954

Special Issue No. 1

(Refused.) Do you find from a preponderance of the evidence that H. T. Arnold, in proceeding to walk with his back to the Billings truck at the time and place in question, failed to take reasonable precaution for his own safety?

Answer: "Yes" or "No."

Answer: ——.

If you have answered the above special issue "Yes" and only in such event, then answer the following special issue:

Special Issue No. 2

(Refused.) Do you find from a preponderance of the evidence that the failure of H. T. Arnold to take reasonable precaution for his own safety in proceeding to walk with his back to the Billings truck, at the time and place in question, if you have so found, was negligence?

Answer: "Yes" or "No."

Answer: ——.

If you have answered the above special issue "Yes" and only in such event, then answer the following special issue:

Special Issue No. 3

(Refused.) Do you find from a preponderance of the evidence that plaintiff's said negligence, if any, was a proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer: "Yes" or "No."

Answer: ——.

[fol. 410] If you have answered special issue No. 2 "Yes" and only in such event, then answer the following special issue:

Special Issue No. 4

(Refused.) Do you find from a preponderance of the evidence that plaintiff's said negligence, if any, was the sole proximate cause of the injuries, if any, sustained on January 16, 1954?

Answer "Yes" or "No."

Answer: ——.

Special Issue No. 5

(Refused.) Do you find from a preponderance of the evidence that H. T. Arnold failed to keep a proper lookout for his own safety at the time and place in question?

Answer: "Yes" or "No."

Answer: ——.

If you have answered the above special issue "Yes" and only in such event, then answer the following special issue:

Special Issue No. 6

(Refused.) Do you find from a preponderance of the evidence that plaintiff's failure to keep a proper lookout,

if he did so fail, was a proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer: "Yes" or "No."

Answer: ——.

If you have answered the special issue No. 5 "Yes" and only in such event, then answer the following special issue:

Special Issue No. 7

(Refused.) Do you find from a preponderance of the evidence that plaintiff's failure to keep a proper *look* [fol. 411] lookout, if he did so fail, was the sole proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer "Yes" or "No".

Answer: ——.

Special Issue No. 8

(Refused.) (Omit.) Do you find from a preponderance of the evidence that the plaintiff, H. T. Arnold, moved from under the baggage car and into the path of the Billings truck, when such movement could not be made with safety?

Answer: "Yes" or "No".

Answer: ——.

If you have answered the above special issue "Yes" and only in such event, then answer the following special issue:

Special Issue No. 9

(Refused.) (Omit.) Do you find from a preponderance of the evidence that such movement, if any, from under the baggage car and into the path of the Billings truck, when such movement could not be made with safety, was negligence?

Answer: "Yes" or "No".

If you have answered the above special issue "Yes" and only in such event, then answer the following special issue:

Special Issue No. 10

(Refused.) (Omit.) Do you find from a preponderance of the evidence that plaintiff's said negligence, if any, was a proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer: "Yes" or "No".

Answer: ——.

If you have answered special issue No. 9 "Yes" and [fol. 412] only in such event, then answer the following special issue:

Special Issue No. 11

(Refused.) (Omit.) Do you find from a preponderance of the evidence that plaintiff's said negligence, if any, was the sole proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer: "Yes" or "No".

Answer: ——.

Special Issue No. 12

(Refused.) Do you find from a preponderance of the evidence that the plaintiff moved into the graveled area with his back to the truck, under the existing circumstances of reduced visibility which he had created?

Answer: "Yes" or "No".

Answer: ——.

If you have answered the above special issue "Yes" and only in such event, then answer the following special issue:

Special Issue No. 13

(Refused.) Do you find from a preponderance of the evidence that such movement, if any, into the graveled area with his back to the truck, under the existing circumstances of reduced visibility which he had created, was negligence?

Answer: "Yes" or "No".

Answer: ——.

If you have answered the above special issue "Yes" and only in such event, then answer the following special issue:

Special Issue No. 14

(Refused.) Do you find from a preponderance of the evidence that plaintiff's said negligence, if any, was a proximate cause of the injuries, if any, sustained on Janu-
[fol. 413] ary 16, 1952?

Answer: "Yes" or "No".

Answer: ——.

If you have answered special issue No. 13 "Yes" and only in such event, then answer the following special issue:

Special Issue No. 15

(Refused.) Do you find from a preponderance of the evidence that plaintiff's said negligence, if any, was the sole proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer: "Yes" or "No".

Answer: ——

Special Issue No. 16

Do you find from a preponderance of the evidence that the injuries, if any, to the plaintiff were not the result of an unavoidable accident? The form of your answer shall be: "It was an unavoidable accident" or "It was not an unavoidable accident."

By the term "unavoidable accident", as used in *t* this Charge, is meant an event which occurs without any negligence of the plaintiff or the defendant or its employees.

Answer: ——

Special Issue No. 18

(Omit.) How much, if any, do you find from a preponderance of the evidence should the plaintiff's damages, if any, be diminished as a proximate result of the plaintiff's own negligence, if any?

Answer in dollars and cents.

[fol. 414] In connection with this issue you are instructed if you have found in answer to preceding issues that the damages, if any, sustained by plaintiff were caused in part by the negligence, if any, of the defendant and in part by the negligence, if any, of the plaintiff, then you will find that sum which represents the proportion that the amount of negligence, if any, attributable to plaintiff bears to the total damages, if any, found in answer to the preceding question.

Answer: $——.

Special Issue No. 19

(Refused.) (Omit.) Do you find from a preponderance of the evidence that the prior injury received by H. T.

Arnold in 1926, has not contributed to the incapacity, if any, you have found, to plaintiff, H. T. Arnold?

Answer: "It has not contributed" or "It has contributed".

Answer: ——

If you have answered the foregoing special issue "It has contributed", and only if you have so answered the same, then answer the following special issue:

Special Issue No. 20

(Refused.) (Omit.) What do you find from a preponderance of the evidence to be the percentage that such prior injury has contributed, if any, to plaintiff's incapacity, if any.

Answer by stating a percentage.

Answer: ——

Respectfully requested—Charles L. Cobb, Attorney for P&SF Railway Co.

[File endorsement omitted.]

[fol. 415] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT, PANHANDLE AND SANTA FE RAILWAY COMPANY'S OBJECTIONS AND EXCEPTIONS TO THE COURT'S CHARGE—Filed December 7, 1954

Comes now the Defendant, Panhandle and Santa Fe Railway Company, in due and proper time, and before the reading of the Charge of the Court to the Jury, and presents these, its objections and exceptions to the Court's main Charge.

1

Defendant objects and excepts to the refusal of the Court to include its Requested Special Issues Numbers 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 19, and 20, both separately and collectively.

2

The Defendant objects to the definition of the term "proximate cause," as used in the Court's Charge, for the reason that, as defined, such term improperly includes the element of negligence. Defendant suggests that a proper definition of said term should omit that language commencing at "and which said result, or some like result ought reasonable to have been foreseen."

3

This Defendant objects and excepts to the definition of the term "new and independent cause" for the reason that said definition is defined as such agency as that without which the event in question would not have occurred; that the definition given by the Court is confusing and misleading to the Jury, and not capable of being understood, and that said statement that such agency must be one without which the event in question would not have occurred is contrary to the established law. In this connection the Defendant submits that the following instruction is a substantially correct instruction on new and independent [fol. 416] cause, "By the term 'new and independent cause,' as used in this Charge, and in the Charge of 'proximate cause,' above given, is meant the act or omission of a separate and independent agency, which destroys the causal connection between the negligent act, or omission of the Defendant, and the injury complained of, and thereby becomes, in itself, the immediate cause of such injury."

4

The Defendant objects and excepts to Special Issue No. 1, because the same, as submitted, amounts to a general Issue; the said Issue does not confine the question to any particular time or any particular place; the Issue permits the Jury to speculate on probabilities.

The Defendant further objects to Special Issue No. 1, for the reason that the said Issue seeks to charge this Defendant with an unreasonable duty of care, under the circumstances, and assumes, without regard to the normal operations of a Railroad Company, that said Company, under all the circumstances, should furnish all of its em-

ployees a safe place in which to work; further, the said Issue does not define, or otherwise indicate, what is intended to be meant by a reasonably safe place in which to work. The said Special Issue, as phrased, amounts to a comment by the Court on the weight of the evidence.

5

The Defendant objects to the subsidiary Issue No. 2, because the same, as submitted, amounts to a general Issue; the said Issue does not confine the question to any particular time or any particular place; the Issue permits the Jury to speculate on probabilities.

The Defendant further objects to the subsidiary Issue No. 2, for the reason that the said Issue seeks to charge this defendant with an unareasonable duty of care, under the circumstances, and assumes, without regard to the [fol. 417] normal operations of a Railroad Company, that said Company, under all the circumstances, should furnish all of its employees a safe place in which to work; further, the said Issue does not define, or otherwise indicate, what is intended to be meant by a reasonably safe place in which to work. The said Special Issue, as phrased, amounts to a comment by the Court on the weight of the evidence.

6

The Defendant objects to the subsidiary Issue No. 3, because the same, as submitted, amounts to a general Issue; the said Issue does not confine the question to any particular time or any particular place; the Issue permits the Jury to speculate on probabilities.

The Defendant further objects to the subsidiary Issue No. 3, for the reason that the said Issue seeks to charge this defendant with an unreasonable duty of care, under the circumstances, and assumes, without regard to the normal operations of a Railroad Company, that said Company, under all the circumstances, should furnish all of its employees a safe place in which to work; further, the said Issue does not define, or otherwise indicate, what is intended to be meant by a reasonably safe place in which to work. The said Special Issue, as phrased, amounts to a comment by the Court on the weight of the evidence.

7

The defendant objects and excepts to the subsidiary Issue No. 3A, because the same, as submitted, amounts to a general Issue; the said Issue does not confine the question to any particular time or any particular place; the Issue permits the Jury to speculate on probabilities.

The Defendant further objects to subsidiary Issue No. 3A, for the reason that the said Issue seeks to charge this Defendant with an unreasonable duty of care, under the circumstances, and assumes, without regard to the normal [fol. 418] operations of a Railroad Company, that said Company, under all the circumstances, should furnish all of its employees a safe place in which to work; further, the said Issue does not define, or otherwise indicate, what is intended to be meant by a reasonably safe place in which to work. The said Special Issue, as phrased, amounts to a comment by the Court on the weight of the evidence.

8

The defendant objects and excepts to Special Issue No. 4, because the same implies a duty which is not required by law, and would place an undue burden upon this defendant; the said Special Issue assumes that the Railroad Company had control of the driver of the Billings truck at the time and place in question, whereas, the undisputed evidence shows that the driver was under the employment of Defendant Billings, and it was stipulated that said driver was acting in the course and scope of such employment at the time and place in question. The said Special Issue disregards any element of negligence or duty of care on the part of the Plaintiff Arnold. The Issue seeks to make the Railroad Company an insurer of Arnold under any and all circumstances. In addition, the said Special Issue is not an issue of fact upon which a Judgment could be based; it is an evidentiary Issue and not an ultimate Issue. The said issue, as phrased, amounts to a comment by the Court on the weight of the evidence.

9

The defendant objects and excepts to Special Issue No. 5, because the same implies a duty which is not required by

law, and would place an undue burden upon this Defendant; the said Special Issue assumes that the Railroad Company had control of the driver of the Billings truck at the time and place in question, whereas, the undisputed evidence shows that the driver was under the employment of defendant Billings, and it was stipulated that said driver [fol. 419] was acting in the course and scope of such employment at the time and place in question. The said Special Issue disregards any element of negligence or duty of care on the part of the Plaintiff Arnold. The Issue seeks to make the Railroad Company an insurer of Arnold under any and all circumstances. In addition, the said Special Issue is not an issue of fact upon which a Judgment could be based; it is an evidentiary issue and not an ultimate issue. The said Issue, as phrased, amounts to a comment by the Court on the weight of the evidence.

10

The Defendant objects and excepts to Special Issue No. 6, because the same implies a duty which is not required by law, and would place an undue burden upon this Defendant; the said Special Issue assumes that the Railroad Company had control of the driver of the Billings truck at the time and place in question, whereas, the undisputed evidence shows that the driver was under the employment of Defendant Billings, and it was stipulated that said driver was acting in the course and scope of such employment at the time and place in question. The said Special Issue disregards any element of negligence or duty of care on the part of the Plaintiff Arnold. The Issue seeks to make the R-ilroad Company an insurer of Arnold under any and all circumstances. In addition, the said Special Issue is not an issue of fact upon which a Judgment could be based; it is an evidentiary issue and not an ultimate issue. The said Issue, as phrased, amounts to a comment by the Court on the weight of the evidence.

11

The Defendant objects and excepts to Special Issue No. 6A, because the same implies a duty which is not required by law, and would place an undue burden upon this Defend-

ant; the said Special Issue assumes that the Railroad Company had control of the driver of the Billings truck at the time and place in question, whereas, the undisputed [fol. 420] evidence shows that the driver was under the employment of defendant Billings, and it was stipulated that said driver was acting in the course and scope of such employment at the time and place in question. The said Special Issue disregards any element of negligence or duty of care on the part of the Plaintiff Arnold. The Issue seeks to make the Railroad Company an insurer of Arnold under any and all circumstances. In addition, the said Special Issue is not an issue of fact upon which a Judgment could be based; it is an evidentiary issue and not an ultimate issue. The said Issue, as phrased, amounts to a comment by the Court on the weight of the evidence.

12

The defendant objects and excepts to Special Issue No. 7 for the reason that the said Issue, as phrased, is a question, or presents a question which is so general that it does not permit a proper answer by the Jury; the said question does not define the area which is inquired of, nor does the same define or limit the work which is inquired of. The said Issue does not present an ultimate issue of fact upon which Judgment could be based. The said Special Issue seeks to impose a duty upon this Defendant which is not required by law, and would impose an unreasonable burden upon this Defendant. The said Issue, in effect, instructs the Jury that the Plaintiff performed all of his work in the area where the truck was being driven, and where the alleged accident occurred, whereas, the evidence is undisputed that Plaintiff spent only a small portion of his working day in the said area. The said Issue would lead the Jury to believe that this Defendant had control over the truck and the driver at the time and place in question. The said Issue, as phrased, fails to take into account the requirements of this Defendant in the normal conduct of its operations. The said Special Issue, as phrased, amounts to an improper comment by the Court upon the weight of the evidence.

[fol. 421] 13

The Defendant objects and excepts to Special Issue No. 8, for the reason that the said Issue, as phrased, is a question, or presents a question which is so general that it does not permit a proper answer by the Jury; the said question does not define the area which is inquired of. The said Issue does not present an ultimate Issue of fact upon which Judgment could be based. The said Special Issue seeks to impose a duty upon this defendant which is not required by law, and would impose an unreasonable burden upon this Defendant. The said Issue, in effect, instructs the Jury that the plaintiff performed all of his work in the area where the truck was being driven, and where the alleged accident occurred, whereas, the evidence is undisputed that Plaintiff spent only a small portion of his working day in the said area. The said Issue would lead the Jury to believe that this Defendant had control over the truck and the driver at the time and place in question. The said Issue, as phrased, fails to take into account the requirements of this Defendant in the normal conduct of its operations. The said Special Issue, as phrased, amounts to an improper comment by the Court upon the weight of the evidence.

14

The Defendant objects and excepts to Special Issue No. 9, for the reason that the said Issue, as phrased, is a question, or presents a question which is so general that it does not permit a proper answer by the Jury; the said question does not define the area which is inquired of, nor does the same define or limit the work which is inquired of. The said Issue does not present an ultimate issue of fact upon which Judgment could be based. The said Special Issue seeks to impose a duty upon this Defendant which is not required by law, and would impose an unreasonable burden upon this defendant. The said Issue, in effect, instructs the Jury that the Plaintiff performed all of his work in the area where the truck was being driven, and where the al-[fol. 422] leged accident occurred; whereas, the evidence is undisputed that Plaintiff spent only a small portion of his working day in the said area. The said Issue would lead the Jury to believe that this Defendant had control

over the truck and the driver at the time and place in question. The said Issue, as phrased, fails to take into account the requirements of this Defendant in the normal conduct of its operations. The said Special Issue, as phrased, amounts to an improper comment by the Court upon the weight of the evidence.

15

The Defendant objects and excepts to Special Issue No. 9A, for the reason that the said Issue, as phrased, is a question, or presents a question which is so general that it does not permit a proper answer by the Jury; the said question does not define the area which is inquired of, nor does the same define or limit the work which is inquired of. The said Issue does not present an ultimate Issue of fact upon which Judgment could be based. The said Special Issue seeks to impose a duty upon this Defendant which is not required by law, and would impose an unreasonable burden upon this Defendant. The said Issue, in effect, instructs the Jury that the Plaintiff performed all of his work in the area where the truck was being driven, and where the alleged accident occurred, whereas, the evidence is undisputed that Plaintiff spent only a small portion of his working day in the said area. The said Issue would lead the Jury to believe that this Defendant had control over the truck and the driver at the time and place in question. The said Issue, as phrased, fails to take into account the requirements of this Defendant in the normal conduct of its operations. The said Special Issue, as phrased, amounts to an improper comment by the Court upon the weight of the evidence.

16

Defendant objects and excepts to Special Issue No. 10, [fol. 423] for the reason that the said Issue, in effect, instructs the Jury that this Defendant was under a duty to the Plaintiff to maintain a lookout for him under the circumstances. The said Issue assumes that the Panhandle and Santa Fe Railway Company, by maintaining a lookout for the Plaintiff, could have prevented the injury to him, if any, which said injury was caused by the agency of a third party. The said Special Issue seeks to impose a duty upon the Railroad Company to maintain a lookout for the

Plaintiff at the time and place, and under the circumstances in question; whereas, the evidence is undisputed that at the particular time that the alleged injury occurred, the Plaintiff Arnold was the only Railroad employee, and the only person connected with the Railroad who was present and in a position to keep a lookout for the safety of said Plaintiff Arnold. The said Issue seeks to impose an unreasonable duty on the Railroad Company to keep a lookout for the Plaintiff, under any and all circumstances, completely disregarding the normal operations of a Railroad Company. The said Issue, as submitted, seeks to absolve the Plaintiff from any duty of care on his own behalf. The said Special Issue is not limited as to time and place in question.

17

Defendant objects and excepts to Special Issue No. 11, for the reason that the said Issue, in effect, instructs the Jury that this defendant was under a duty to the Plaintiff to maintain a lookout for him under the circumstances. The said Issue assumes that the Panhandle and Santa Fe Railway Company, by maintaining a lookout for the Plaintiff, could have prevented the injury to him, if any, which said injury was caused by the agency of a third party. The said Special Issue seeks to impose a duty upon the Railroad Company to maintain a lookout for the Plaintiff at the time and place, and under the circumstances in question, whereas, the evidence is undisputed that at the particular time that the alleged injury occurred, the Plaintiff, [fol. 424] Arnold was the only Railroad employee, and the only person connected with the Railroad who was present and in a position to keep a lookout for the safety of said Plaintiff Arnold. The said Issue seeks to impose an unreasonable duty on the Railroad Company to keep a lookout for the Plaintiff under any and all circumstances, completely disregarding the normal operations of a Railroad Company. The said issue, as submitted, seeks to absolve the Plaintiff from any duty of care on his own behalf. The said Special Issue is not limited as to time and place in question.

18

Defendant objects and excepts to Special Issue No. 11A, for the reason that the said Issue, in effect, instructs the Jury that this Defendant was under a duty to the Plaintiff to maintain a lookout for him under the circumstances. The said Issue assumes that the Panhandle and Santa Fe Railway Company, by maintaining a lookout for the Plaintiff, could have prevented the injury to him, if any, which said injury was caused by the agency of a third party. The said Special Issue seeks to impose a duty upon the Railroad Company to maintain a lookout for the Plaintiff at the time and place, and under the circumstances in question, whereas, the evidence is undisputed that at the particular time that the alleged injury occurred, the Plaintiff Arnold was the only Railroad employee, and the only person connected with the Railroad who was present and in a position to keep a lookout for the safety of said Plaintiff Arnold. The said Issue seeks to impose an unreasonable duty on the Railroad Company to keep a lookout for the Plaintiff under any and all circumstances, completely disregarding the normal operations of a Railroad Company. The said Issue, as submitted, seeks to absolve the Plaintiff from any duty of care on his own behalf. The said Special Issue is not limited as to time and place in question.

[fol. 425] 19

The Defendant objects and excepts to Special Issue No. 22, for the reason that the same is improperly placed in the Court's Charge, and, as so placed, serves to inform the Jury which Issues are Plaintiff's Issues and which Issues are those of the Defendant. The Defendant suggests that this Issue, the damage issue, should be placed with Special Issue No. 38, which is also a damage issue, and that both of said Issues should be so placed in the Charge as to not indicate whether or not any Issues are defensive Issues or Plaintiff's Issues.

The Defendant further objects to Special Issue No. 22, for the reason that the instruction given in connection with the said Special Issue does not properly instruct with respect to the determination of present or cash value of any sum of money which might be awarded with respect to the

various elements of damage therein embodied. Defendant submits that a proper instruction with respect to present value is that in determining such amount, the Jury should take into consideration the rate of interest at which such money could be safely and securely invested, and should determine the present value of said amount so allowed by discounting the same, or deducting therefrom annually an amount equal to the rate of interest at which said money could be safely and securely invested during the period for which the Jury might allow damages.

The Defendant further objects to Special Issue No. 22, for the reason that the same amounts to a general Charge, and submits that Requested Special Issues of this Defendant Number 19 and Number 20 should be incorporated in, and present a proper measure with respect to injuries received prior to the injury in litigation. The said Special Issue No. 22 is confusing and unintelligible, and permits the Jury to speculate upon probabilities.

20

The Defendant objects and excepts to Special Issue No. [fol. 426] 30, and submits that a proper submission of the Issue inquired of is found at this Defendant's Requested Special Issue No. 8.

21

The Defendant objects and excepts to the submission of Special Issue No. 31, in the particular language used, and submits that a proper submission of such Issue is embodied in this Defendant's Requested Special Issue No. 9.

22

This Defendant objects to the submission of Special Issue No. 32, in the particular language used therein, and submits that a proper submission of the said Issue is embodied in this Defendant's Requested Special Issue No. 10. This Defendant further objects to the said Special Issue No. 32 because the same inquires with respect to the "cause of the accident," which is not an ultimate issue in this Cause. Defendant submits in this connection that the inquiry should be with respect to Plaintiff's injury.

23

The Defendant objects to the submission of Special Issue No. 32A, in the particular language used, and submits that a proper submission of the Issue inquired of is embodied in this Defendant's Requested Special Issue No. 11. The Defendant further objects to the submission of said Special Issue No. 32A, in that the same inquires of "cause of the accident." The same does not inquire of any fact which is an ultimate issue in this Cause. Defendant submits that the Issue should be directed to Plaintiff's injuries, if any.

24

The Defendant objects an dexcepts to the submission of Special Issues Numbers 35, 36, and 36A, with respect to the particular language used in said submission, and submits that a proper submission of the Issues presented by this series of Special Issues is embodied in this Defendant's Requested Special Issues Numbers 12, 13, 14, [fol. 427] and 15.

25

The Defendant further objects and excepts to the Court's main Charge, in that the Court refused to submit its Requested Special Issues Numbers 5, 6, and 7, and, in fact, refused all of this Defendant's Requested Special Issues, with the exception of the Issue on unavoidable accident, thus depriving this Defendant of all defensive issues alleged in its pleadings, and established by the evidence in this Case.

26

The Defendant objects and excepts to the submission of Special Issue No. 33, in the particular language there used, for the reason that the same is not a proper submission of the Issue of proper lookout, under the evidence in this case. The said Special Issue, as worded, restricts proper lookout to consideration of the truck of the Defendant Billings, and completely disregards any duty of proper lookout on the part of Plaintiff toward any other factors in connection with the particular type of work in which he was engaged, and the character of the place where he was working. The submission is prejudicial to this Defendant,

in that it deprives the Defendant of the defense of proper lookout, with respect to any matters, other than that of the truck of the Defendant Billings. The Defendant submits that a proper Issue with respect to lookout is embodied in Defendant's Requested Special Issue No. 5, together with the subsidiary Issues 6 and 7.

27

This Defendant objects and excepts to the submission of Special Issue No. 34, in connection with Special Issue No. 33, as worded.

28

This Defendant objects and excepts to the submission of Special Issue No. 34A, in connection with Special Issue [fol. 428] No. 33, as worded.

29

Defendant further objects and excepts to the series of Special Issues Numbers 33, 34, and 34A, with respect to proper lookout, because the said series deprives this Defendant, particularly of its defense of sole proximate cause. The series of Issues limits the inquiry with respect to sole proximate cause to the Plaintiff Arnold's failure, if any, to keep a proper lookout for the truck of the Defendant Billings, and completely disregards any failure of Plaintiff to keep a lookout with respect to other matters at the time and place, and under the circumstances not connected with the Billings truck.

Furthermore, said Issue places this defendant in the position of having a connection with an active tort, whereas, there is absolutely no evidence in this case of any active negligence on the part of this Defendant. The only evidence, if there be evidence, would be of a passive nature.

Of all of which objections and exceptions the defendant prays Judgment of the Court.

Respectfully submitted, McWhorter, Howard, Cobb & Johnson, Attorneys for Panhandle and Santa Fe Railway Company, by Charles L. Cobb.

[File endorsement omitted.]

[fol. 429] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

CHARGE OF THE COURT—Filed November 26, 1954

Gentlemen of the Jury:

This case will be submitted to you upon Special Issues and the verdict of the jury will consist of answers to the questions propounded to you in this Charge, and any Special Charges requested and given.

You will answer all questions without regard to any effect your answers may have upon the rights of the parties or the judgment to be rendered herein.

You are the exclusive judges of the facts proven, of the credibility of the witnesses who have testified and of the weight and sufficiency of the evidence submitted before you, but you will take the law from the Court, as it is given you in this charge, and be governed thereby.

During your deliberations you will be permitted to separate as your convenience may require, but during such time and prior to your returning a verdict herein, you must not converse with, or permit yourselves to be addressed by any other person on any subject connected with this case.

You will not discuss or take into consideration any fact or matter concerning this case which you know of your own knowledge or which you may have learned from one of your fellows, or from any source whatsoever, other than through the evidence admitted by the Court during the trial.

You will not attempt to reach a verdict by any sort of agreement beforehand as to which party should recover, but you will only consider the respective issues submitted to you as the same is herein directed, according as you [fol. 430] may find the fact or facts to be from the evidence admitted for your consideration.

If you wish to communicate with the Court in any way, at any time, you will reduce the same to writing, having the foreman sign it, then notify the officer in charge, who shall inform the Court thereof, whereupon you will be con-

ducted into open Court for the purpose of such communication.

You are not to reach a verdict by any species of lot or chance, or any sort of agreement other than your fair consideration of the evidence admitted before you, to the end that your findings may truly represent your deliberate conclusions based upon a fair consideration of the evidence under these instructions.

By the expression "Preponderance of the evidence," as used in this charge, is meant the greater degree and weight of credible testimony before you.

You will answer such special issues as you may answer, if any, by unanimous vote.

By the term "ordinary care," as used in this Charge, is meant that degree of care that would be exercised by a person of ordinary prudence under the same or similar circumstances.

By the term "negligence," as used in this Charge, is meant a failure to exercise ordinary care.

By the term "proximate cause," as used in this Charge, is meant that cause, which in its natural and continuous sequence, unbroken by any new and independent cause, produces a result that would not have occurred but for such cause, and which said result, or some like result ought reasonably to have been foreseen or anticipated in the light of the attending circumstances. There may be more than one proximate cause of an event.

By the term "natural and continuous sequence", as used in this charge, is meant the usual and ordinary succession of events.

[fol. 431] By the term "new and independent cause", as that term is used in the above definition of "proximate cause" is meant an agency which breaks the sequence between the original act and the event complained of, which of itself is sufficient to and does produce the event or some like event, and be such agency that without which the event in question would not have occurred. This agency must not be set in motion by the party who initiated the original act, ans which agency and its consequences a person of ordinary prudence under the same or similar circumstances would not have reasonably anticipated and foreseen.

By the term "proper lookout," as used in this Charge, means such a lookout as a person of ordinary prudence would exercise under the same or similar circumstances.

By the term "proper control," as used in this Charge, means such control as a person of ordinary prudence would exercise under the same or similar circumstances.

By the term "sole proximate cause," as used in this Charge, is meant the only proximate cause, as the term "proximate cause" is above defined. There can be only one sole proximate cause.

Special Issue No. 1

Do you find from a preponderance of the evidence that on the occasion in question the defendant, Panhandle and Santa Fe Railway Company, failed to furnish the plaintiff Arnold a reasonably safe place in which to do his work?

Answer "Yes," or "No."

Answer: Yes.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 2

Do you find from a pred*p*onderance of the evidence that such failure, if any, on the part of the defendant, Panhandle and Santa Fe Railway Company, was negligence? [fol. 432] Answer "Yes," or "No."

Answer: Yes.

If you have answered the foregoing Special Issue "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 3

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes," or "No."

Answer: Yes.

If you have answered Special Issue No. 2 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 3A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes," or "No."

Answer: No.

Special Issue No. 4

Do you find from a preponderance of the evidence that on the occasion in question the Defendant, Panhandle and Santa Fe Railway Company, failed to warn the Plaintiff Arnold of the truck as it approached the Plaintiff Arnold?

Answer "Yes," or "No."

Answer: Yes.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 5

Do you find from a preponderance of the evidence that such failure, if any, on the part of the Defendant, Panhandle and Santa Fe Railway Company, was negligence? [fol. 433] Answer "Yes," or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in such even, then answer the following Special Issue.

Special Issue No. 6

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes," or "No."

Answer: ——.

If you have answered Special Issue No. 5 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 6A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of

the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes," or "No."

Answer: ——.

Special Issue No. 7

Do you find from a preponderance of the evidence that on the occasion in question the defendant, Panhandle and Santa Fe Railway Company, permitted motor trucks to be driven on a area used by the plaintiff Arnold in the performance of his work?

Answer "Yes," or "No."

Answer: Yes.

If you have answered the foregoing Special Issue "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 8

Do you find from a preponderance of the evidence that such act in permitting such use, if any, on the part of the Defendant, Panhandle and Santa Fe Railway Company, [fol. 434] was negligence?

Answer "Yes," or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in that event, then answer the following Special Issue.

Special Issue No. 9

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes," or "No."

Answer: ——.

If you have answered Special Issue No. 8 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 9A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes," or "No."

Answer: ——.

Special Issue No. 10

Do you find from a preponderance of the evidence that on the occasion in question Defendant, Panhandle and Santa Fe Railway Company, failed to keep a proper lookout for the Plaintiff?

Answer "Yes," or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 11

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in [fol. 435] question?

Answer "Yes", or "No."

Answer: ——.

If you have answered Special Issue No. 10 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 11A

Do you find from a preponderance of the evidence that such failure, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: ——.

Special Issue No. 12

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver failed to keep a proper lookout for Plaintiff Arnold?

Answer "Yes", or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 13

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: ——.

If you have answered Special Issue No. 12 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 13A

Do you find from a preponderance of the evidence that such failure, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

[fol. 436] Answer "Yes," or "No."

Answer: ——.

Special Issue No. 14

Do you find from a preponderance of the evidence that on the occasion in question Defendant Billings' truck driver failed to give adequate warning before backing said truck?

Answer "Yes", or "No."

Answer: Yes.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 15

Do you find from a preponderance of the evidence that such failure, if any, on the part of the Defendant Billings' truck driver was negligence?

Answer "Yes", or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 16

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the in-

juries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: ——.

If you have answered Special Issue No. 15 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 16A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: ——.

[fol. 437] Special Issue No. 17

Do you find from a preponderance of the evidence that the act of Defendant Billings' truck driver in backing said truck instead of driving forward was negligence?

Answer "Yes", or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in that event, then answer the following Special Issue.

Special Issue No. 18

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: ——.

If you have answered Special Issue No. 17 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 18A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: ——.

Special Issue No. 19

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver backed said truck too close to the railway cars on which Plaintiff Arnold was working?

Answer "Yes", or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in that event, then answer the following Special Issue.

[fol. 438] Special Issue No. 20

Do you find from a preponderance of the evidence that such action, if any, on the part of the Defendant Billings' truck driver was negligence?

Answer "Yes", or "No."

Answer: ——.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 21

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: ——.

If you have answered Special Issue No. 20 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 21A

Do you find from a preponderance of the evidence that such negligence, is any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff on the occasion in question?

Answer "Yes", or "No."

Answer: ——.

Special Issue No. 23

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck

driver drove said truck in reverse at a speed in excess of that which an ordinarily prudent person would have driven it under the same or similar circumstances?

Answer "Yes", or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

[fol. 439] Special Issue No. 24

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff, H. T. Arnold, on the occasion in question?

Answer "Yes", or "No."

Answer: ——.

If you have answered Special Issue No. 23 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 25

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff, H. T. Arnold, on the occasion in question?

Answer "Yes", or "No."

Answer: ——.

Special Issue No. 27

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver operated the truck without clear vision in the direction he was driving?

Answer "Yes," or "No."

Answer: Yes.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 28

Do you find from a preponderance of the evidence that such action, if any, on the part of the Defendant Billings' truck driver was negligence?

Answer "Yes," or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," [fol. 440] and only in such event, then answer the following Special Issue.

Special Issue No. 29

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff, H. T. Arnold on the occasion in question?

Answer "Yes," or "No."

Answer: ——.

If you have answered Special Issue No. 28 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 29A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff, H. T. Arnold on the occasion in question?

Answer "Yes," or "No."

Answer: ——.

Special Issue No. 30

Do you find from a preponderance of the evidence that the plaintiff H. T. Arnold moved into the path of the Billings' truck when such movement could not be made with safety?

Answer "Yes," or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 31

Do you find from a preponderance of the evidence that the movement, if any, of plaintiff H. T. Arnold into the path of said Billings' truck, if he did, was negligence?

Answer "Yes," or "No."

Answer: ——.

If you have answered the foregoing Special Issue "Yes,"

and only in such event, then answer the following Special Issue.

[fol. 441] Special Issue No. 32

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the Plaintiff's injuries, if any?

Answer "Yes," or "No."

Answer: ——.

If you have answered Special Issue No. 31 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 32A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the Plaintiff's injuries, if any?

Answer "Yes," or "No."

Answer: ——.

Special Issue No. 33

Do you find from a preponderance of the evidence that H. T. Arnold failed to keep a proper lookout for the Billings' truck at the time and place in question?

Answer "Yes," or "No."

Answer: Yes.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 34

Do you find from a preponderance of the evidence that Plaintiff's failure to keep a proper lookout, if he did so fail, was a proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer "Yes," or "No."

Answer: Yes.

If you have answered Special Issue No. 33 "Yes," and only in such event, then answer the following Special Issue.

[fol. 442] Special Issue No. 34A

Do you find from a preponderance of the evidence that Plaintiff's failure to keep a proper lookout, if he did so

fail, was the sole proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer "Yes," or "No."

Answer: No.

Special Issue No. 35

Do you find from a preponderance of the evidence that the act of plaintiff H. T. Arnold in turning his back to the Billings' truck, under the existing circumstances, was negligence?

Answer "Yes," or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 36

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the Plaintiff's injuries, if any?

Answer "Yes," or "No."

Answer: ——.

If you have answered Special Issue No. 35 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 36A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the Plaintiff's injuries, if any?

Answer "Yes," or "No."

Answer: ——.

Special Issue No. 37

Do you find from a preponderance of the event that the plaintiff, H. T. Arnold, knew the danger, if any, and appreciated the risk, if any, of being struck by a backing [fol. 443] Billings' truck at the time he moved into the driveway and walked therein?

Answer "Yes," or "No."

Answer: No.

Special Issue No. 38

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably

and fairly compensate H. T. Arnold for his diminished capacity, if any, to labor and earn money up to the present time, if you find he has suffered any up to the present time, and as he may in reasonable probability undergo in the future, if you find he will undergo any in the future, and as would reasonably and fairly compensate him for such physical pain, if any, and mental anguish, if any, as he has suffered in the past, if you find he has suffered any physical pain and mental anguish in the past, and for such physical pain, if any, and mental anguish, if any, as he may in reasonable probability suffer in the future, if you find that he may suffer any in the future as a direct and proximate result of the injuries, if any, sustained by him on the occasion in question?

In answering this Issue you are instructed that you cannot compensate for any physical pain, if any, or mental anguish, if any, resulting from any condition existing before the occurrance in question, except insofar as said condition may have been aggravated by the occurrance in question, if you find that it has been aggravated.

And if you find from the evidence that since the time of Plaintiff's alleged accident that Plaintiff has suffered with ailments independently of such injuries, if any, you will exclude from your findings any suffering or loss of earnings, if any, due solely or partly to such subsequent ailments. In determining the present or cash value, you should take into consideration the highest net rate of interest to which such money could be safely and securely [fol. 444] invested in this locality.

Answer in dollars and cents, if any.

Answer: $30,000.00.

Special Issue No. 39

How much, if any, do you find from a preponderance of the evidence, should the Plaintiff Arnold's damages, if any, be diminished as a proximate result of Plaintiff Arnold's own negligence, if any?

Answer in dollars and cents, if any.

Answer: $12,000.00.

In connection with this Issue, you are instructed if you have found in answer to the preceding Issues that the

damages, if any, sustained by Plaintiff were caused in part by the negligence, if any, of the Defendants, and in part by the negligence, if any, of the Plaintiff, then you will find that sum which represents the proportion that the amount of negligence, if any, attributable to Plaintiff bears to the total damages, if any, found in answer to Special Issue No. 38.

Special Issue No. 40

Do you find from a preponderance of the evidence that the injuries, if any, to the plaintiff were not the result of an unavoidable accident?

The form of your answer shall be: "It was an unavoidable accident," or "It was not an unavoidable accident."

By the term "Unavoidable accident," as used in this Charge, is meant an event which was not proximately caused by the negligence, if any, of the plaintiff H. T. Arnold, the driver of the truck of R. A. Billings, or the Panhandle and Santa Fe Railway Company.

Answer: It was not an unavoidable accident.

After the argument of counsel, you will retire, select one of your number foreman and consider of your verdict, and as you find, so say, and write your answer in the spaces provided opposite the Special Issues, and have your fore-
[fol. 445] man sign in the space provided below.

James G. Denton, Judge Presiding.

We, the jury, have answered the foregoing Special Issues as indicated by our answers thereto.

David W. Sherrill, Foreman.

[File endorsement omitted.]

[fol. 446] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

MOTION FOR JUDGMENT—Filed December 7, 1954

To the Honorable James G. Denton, District Judge:

Comes now, Panhandle & Santa Fe Railway Company, Defendant in the above styled and numbered cause, and files this, its motion for judgment, and in such connection, would show the court as follows:

I

That in answer to Special Issues 1, 2 and 3 presented to the jury, as set forth in full in the form of Judgment attached hereto and marked Exhibit A, it was found that this defendant failed to furnish plaintiff Arnold a reasonably safe place in which to do his work; that such failure was negligence and a proximate cause of plaintiff's injuries. These issues and the answers of the jury thereto should be disregarded in that the jury found, in answer to Special Issues 33 and 34 that plaintiff Arnold failed to keep a proper lookout for the Billings truck at the time and place in question, and that such failure was a proximate cause of the injuries, if any, sustained on January 16, 1952. The jury's findings on Special Issues 33 and 34 when taken in connection with its findings on Special Issues 1, 2 and 3, and when taken in connection with the other issues submitted to and answered by the jury, show conclusively that plaintiff's failure to keep a proper lookout was the causal negligence which resulted in his injuries, amounting to the sole proximate cause thereof. The jury in its verdict in fact found that the only causal negligence which resulted in injuries to H. T. Arnold was the negligence of H. T. Arnold himself, in this: in answer to Special Issue No. 4, the jury found that this defendant failed to warn plaintiff [fol. 447] Arnold of the truck as it approached, but in answer to special issue No. 5, they found that this was not negligence. In answer to Special Issue No. 7, the jury found that this defendant permitted motor trucks to be driven on the area used by plaintiff Arnold in his work,

but in answer to Special Issue No. 8, they found that this was not negligence. In answer to Special Issue No. 10, the jury found that Panhandle & Santa Fe Railway Co. did not fail to keep a proper lookout for the plaintiff. In answer to Special Issue No. 12, the jury found that the Billings' truck driver did not fail to keep a proper lookout for plaintiff Arnold. In answer to Special Issue No. 14, it was determined that the Billings truck driver failed to give an adequate warning before backing his truck, but answering Special Issue No. 15, the jury found that such failure was not negligence. The jury found in Special Issue No. 17 that backing of the Billings truck, instead of driving it forward, was not negligence, and in Special Issue No. 19, that said truck driver did not back his truck too close to the railway cars on which plaintiff Arnold was working. In Special Issue No. 23, it was determined that the truck driver did not propel his truck in reverse at a speed in excess of that which an ordinarily prudent person would have driven under the same or similar circumstances, and in Special Issue No. 27, that said driver operated his truck without clear vision in the direction which he was driving, but that the same was not negligence. These specific findings of the jury eliminate all causal connection between specific acts of negligence as alleged by the plaintiff, and leave in the verdict the finding that Arnold's own negligence in failing to keep a proper lookout at the time and place in question was the proximate cause of his injuries. Issues Nos. 1, 2 and 3, therefore, become a remote cause, which amounts to no proximate cause, since the jury has found on specific issues that overt acts, if any, occurring at the time and place in question, did not cause plaintiff's injuries.

[fol. 448] II

If it be determined by the court that by the jury's answers to Special Issues Nos. 1, 2 and 3, it was found that failure to furnish plaintiff Arnold a reasonably safe place to work was other than the remote cause of plaintiff's injuries, then and in such event only, and in the alternative only, this defendant herewith and hereby requests and prays that the court render judgment for defendant Pan-

handle & Santa Fe Railway non obstante verdicto for the following reasons:

(A). Special Issues 1, 2, 3 and 3-A were erroneously submitted to the jury for each and all of the reasons contained in this defendant's Objections and Exceptions to the submission of such issues (such objections and exceptions having been made prior to the submission of such issues to the jury, and such are incorporated herein by reference the same as if copied in full).

(B). Such special issues are general in character and should be disregarded when taken in connection with specific issues submitted to and answered by the jury.

(C). The court should have given this Defendant's Motion for an Instructed Verdict for each and all of the reasons outlined therein, and reference is hereby made to said Motion as if copied herein in full.

Wherefore, premises considered, Panhandle & Santa Fe Railway Company prays that judgment be entered by the court that plaintiff take nothing as against it, and defendant, R. A. Billings, d/b/a Billings Freight & Baggage Transfer, based on the answers to special issues as found by the jury in form substantially in accordance with Exhibit A attached hereto and made a part hereof, or in the alternative, that the court render judgment for this defendant non obstante verdicto.

Respectfully submitted, Lewis Jeffrey, Amarillo, [fol. 449] Texas; McWhorter, Howard, Cobb & Johnson, 607 Lubbock National Building, Lubbock, Texas, Attorneys for Defendant Panhandle & Santa Fe Railway Company, By Charles L. Cobb.

EXHIBIT A TO MOTION FOR JUDGMENT

No. 23,280

IN THE 99TH DISTRICT COURT OF LUBBOCK COUNTY, TEXAS

H. T. ARNOLD,

vs.

PANHANDLE & SANTA FE RAILWAY COMPANY, *et al.*

Judgment

On the 22nd day of November, 1954, at a regular term of this court, came on for trial the above entitled and numbered cause, and both plaintiff, H. T. Arnold and the defendants, Panhandle & Santa Fe Railway Company and R. A. Billings, d/b/a Billings Freight & Baggage Transfer, appeared in person and by their attorneys, and announced ready for trial, and thereupon came a jury of good and lawful men, consisting of David W. Sherrill and eleven others, who being duly empaneled and sworn, and after hearing the pleadings, the evidence and the charge of the court, upon special issues submitted to them, and the argument of counsel, on the 26th day of November, 1954, retired to consider their verdict, and on the same day returned into open court answers to special issues submitted, as follows:

Special Issue No. 1

Do you find from a preponderance of the evidence that on the occasion in question the defendant, Panhandle and Santa Fe Railway Company, failed to furnish the plaintiff Arnold a reasonable safe place in which to do his work?

Answer "Yes" or No".

Answer: Yes

[fol. 450] If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following special issue.

Special Issue No. 2

Do you find from a preponderance of the evidence that such failure, if any, on the part of the defendant, Panhandle and Santa Fe Railway Company, was negligence?

Answer "Yes", or "No."

Answer: Yes

If you have answered the foregoing Special Issue "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 3

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: Yes

If you have answered Special Issue No. 2 "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 3A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: No

Special Issue No. 4

Do you find from a preponderance of the evidence that on the occasion in question the Defendant, Panhandle & Santa Fe Railway Company, failed to warn the Plaintiff Arnold of the truck as it approached the Plaintiff Arnold?

Answer "Yes", or "No."

Answer: Yes

If you have answered the foregoing Special Issue "Yes", [fol. 451] and only in such event, then answer the following special issue.

Special Issue No. 5

Do you find from a preponderance of the evidence that such failure, if any, on the part of the Defendant, Panhandle and Santa Fe Railway Company, was negligence?

Answer "Yes", or "No."

Answer: No

If you have answered the foregoing Special Issue "Yes,"

and only in such event, then answer the following Special Issue.

Special Issue No. 6

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: ——

If you have answered Special Issue No. 5 "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 6A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plantiff Arnold on the occasion in question?

Answer "Yes", or "No."

Answer: ——

Special Issue No. 7

Do you find from a preponderance of the evidence that on the occasion in question the defendant, Panhandle & Santa Fe Railway Company, permitted motor trucks to be driven on a area used by the plaintiff Arnold in the performance of his work?

Answer "Yes", or "No."

Answer: Yes

If you have answered the foregoing Special Issue "Yes", and only in such event, then answer the following Special Issue.

[fol. 452] Special Issue No. 8

Do you find from a preponderance of the evidence that such act in permitting such use, if any, on the part of the Defendant, Panhandle and Santa Fe Railway Company, was negligence?

Answer "Yes" or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes", and only in that event, then answer the following Special Issue.

Special Issue No. 9

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

If you have answered Special Issue No. 8 "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 9A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

Special Issue No. 10

Do you find from a preponderance of the evidence that on the occasion in question Defendant, Panhandle and Santa Fe Railway Company, failed to keep a proper lookout for the Plaintiff?

Answer "Yes" or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 11

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the injuries, [fol. 453] if any, suffered by plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

If you have answered Special Issue No. 10 "Yes" and only in such event, then answer the following Special Issue.

Special Issue No. 11A

Do you find from a preponderance of the evidence that such failure, if any, was the sole proximate cause of the

injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

Special Issue No. 12

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver failed to keep a proper lookout for Plaintiff Arnold?

Answer "Yes" or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes", and only in that event, then answer the following Special Issue.

Special Issue No. 13

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

If you have answered Special Issue No. 12 "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 13A

Do you find from a preponderance of the evidence that such failure, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

[fol. 454] Answer "Yes" or "No".

Answer: ——.

Special Issue No. 14

Do you find from a preponderance of the evidence that on the occasion in question Defendant Billings' truck driver failed to give adequate warning before backing said truck?

Answer "Yes" or "No."

Answer: Yes.

If you have answered the foregoing Special Issue "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 15

Do you find from a preponderance of the evidence that such failure, if any, on the part of the Defendant Billings' truck driver was negligence?

Answer "Yes" or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 16

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

If you have answered Special Issue No. 15 "Yes" and only in such event, then answer the following Special Issue.

Special Issue No. 16A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

[fol. 455] Special Issue No. 17

Do you find from a preponderance of the evidence that the act of Defendant Billings' truck driver in backing said truck instead of driving forward was negligence?

Answer "Yes" or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes", and only in that event, then answer the following Special Issue.

Special Issue No. 18

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the in-

juries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

If you have answered Special Issue No. 17 "Yes" and only in such event, then answer the following Special Issue.

Special Issue No. 18A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

Special Issue No. 19

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver backed said truck too close to the railway cars on which Plaintiff Arnold was working?

Answer "Yes," or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes" and only in that event, then answer the following Special Issue.

Special Issue No. 20

[fol. 456] Do you find from a preponderance of the evidence that such action, if any, on the part of the Defendant Billings' truck driver was negligence?

Answer "Yes," or "No."

Answer: ——.

If you have answered the foregoing Special Issue "Yes" and only in such event, then answer the following Special Issue.

Special Issue No. 21

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes," or "No."

Answer: ——.

If you have answered Special Issue No. 20 "Yes" and only in such event, then answer the following Special Issue.

Special Issue No. 21A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes," or "No."

Answer: ——.

Special Issue No. 23

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver drove said truck in reverse at a speed in excess of that which an ordinarily prudent person would have driven it under the same or similar circumstances?

Answer "Yes," or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 24

[fol. 457] Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by plaintiff, H. T. Arnold, on the occasion in question?

Answer "Yes," or "No."

Answer: ——.

If you have answered Special Issue No. 23 "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 25

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff, H. T. Arnold, on the occasion in question?

Answer "Yes," or "No."

Answer: ——.

Special Issue No. 27

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver operated the truck without clear vision in the direction he was driving?

Answer "Yes," or "No."

Answer: Yes.

If you have answered the foregoing Special Issue "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 28

Do you find from a preponderance of the evidence that such action, if any, on the part of the Defendant Billings' truck driver was negligence?

Answer "Yes" or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 29

Do you find from a preponderance of the evidence that [fol. 458] such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff, H. T. Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

If you have answered Special Issue No. 28 "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 29A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any, suffered by Plaintiff, H. T. Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: ——.

Special Issue No. 30

Do you find from a preponderance of the evidence that the plaintiff H. T. Arnold moved into the path of the Bill-

ings' truck when such movement could not be made with safety?

Answer "Yes" or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 31

Do you find from a preponderance of the evidence that the movement, if any, of plaintiff H. T. Arnold into the path of said Billings' truck, if he did, was negligence?

Answer "Yes" or "No."

Answer: ——.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 32

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the in-
[fol. 459] juries, if any?

Answer "Yes" or "No."

Answer: ——.

If you have answered Special Issue No. 31 "Yes" and only in such event, then answer the following special issue.

Special Issue No. 32A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any?

Answer "Yes" or "No."

Answer: ——.

Special Issue No. 33

Do you find from a preponderance of the evidence that H. T. Arnold failed to keep a proper lookout for the Billings' truck at the time and place in question?

Answer "Yes," or "No."

Answer: Yes.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 34

Do you find from a preponderance of the evidence that Plaintiff's failure to keep a proper lookout, if he did so fail, was a proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer "Yes," or "No."

Answer: Yes.

If you have answered Special Issue No. 33 "Yes" and only in such event, then answer the following Special Issue.

Special Issue No. 34A

Do you find from a preponderance of the evidence that plaintiff's failure to keep a proper lookout, if he did so fail, was the sole proximate cause of the injuries, if any, [fol. 460] sustained on January 16, 1952?

Answer "Yes," or "No."

Answer: No.

Special Issue No. 35

Do you find from a preponderance of the evidence that the act of plaintiff H. T. Arnold in turning his back to the Billings' truck, under the existing circumstances, was negligence?

Answer "Yes," or "No."

Answer: No.

If you have answered the foregoing Special Issue "Yes," and only in such event, then answer the following Special Issue.

Special Issue No. 36

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any?

Answer "Yes," or "No."

Answer: ——.

If you have answered Special Issue No. 35 "Yes", and only in such event, then answer the following Special Issue.

Special Issue No. 36A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the injuries, if any?

Answer "Yes" or "No."
Answer: ——.

Special Issue No. 37

Do you find from a preponderance of the evidence that the plaintiff, H. T. Arnold, knew the danger, if any, and appreciated the risk, if any, of being struck by a backing Billings' truck at the time he moved into the driveway and walked therein?

Answer "Yes" or "No."
Answer: No.

Special Issue No. 38

[fol. 461] What sum of money, if any, if paid now in cash, do you find from the preponderance of the evidence would reasonably and fairly compensate H. T. Arnold for his diminished capacity, if any, to labor and earn money up to the present time, if you find he has suffered any up to the present time, and as he may in reasonable probability undergo in the future, if you find he will undergo any in the future, and as would reasonably and fairly compensate him for such physical pain, if any, and mental anguish, if any, he has suffered in the past, if you find he has suffered any physical pain and mental anguish in the past, and for such physical pain, if any, mental anguish, if any, as he may in reasonable probability suffer in the future, if you find that he may suffer any in the future as a direct and proximate result of the injuries, if any, sustained by him on the occasion in question?

In answering this Issue you are instructed that you cannot compensate for any physical pain, if any, or mental anguish, if any, or diminished capacity to work and earn money, if any, resulting from any condition existing before the occurrance in question, except insofar as said condition may have been aggravated by the occurrance in question, if you find that it has been aggravated.

And if you find from the evidence that since the time of Plaintiff's alleged accident that Plaintiff has suffered with ailments independently of such injuries, if any, you will exclude from your findings any suffering or loss of earnings, if any, due solely or partly to such subsequent ailments. In determining the present or cash value, you

should take into consideration the highest net rate of interest to which such money could be safely and securely invested in this locality.

Answer in dollars and cents, if any.

Answer: $30,000.

Special Issue No. 39

[fol. 462] How much, if any, do you find from a preponderance of the evidence, should the Plaintiff Arnold's damages, if any, be diminished as a proximate result of Plaintiff Arnold's own negligence, if any?

Answer in dollars and cents, if any.

Answer: $12,000.

In connection with this Issue, you are instructed if you have found in answer to the preceding Issues that the damages, if any, sustained by Plaintiff were caused in part by the negligence, if any, of the Defendants, and in part by the negligence, if any, of the Plaintiff, then you will find that sum which represents the proportion that the amount of negligence, if any, attributable to Plaintiff bears to the total damages, if any, found in answer to Special Issue No. 38.

Special Issue No. 40

Do you find from a preponderance of the evidence that the injuries, if any, to the plaintiff were not the result of an unavoidable accident?

The form of your answer shall be: "It was an unavoidable accident," or "It was not an unavoidable accident."

By the term "unavoidable accident," as used in this Charge, is meant an event which was not proximately caused by the negligence, if any, of the plaintiff H. T. Arnold, the driver of the truck of R. A. Billings, or the Panhandle and Santa Fe Railway Company.

Answer: It was not—

After the argument of counsel, you will retire, select one of your number foreman and consider of your verdict, and as you find, so say and write your answers in the spaces provided opposite the Special Issues, and have your foreman sign in the space provided below.

(S) James G. Denton, Judge Presiding.

We, the jury, have answered the foregoing Special Issues [fol. 463] as indicated by our answers thereto.

(S) David W. Sherrill".

Said verdict and answers of the jury were received and accepted by the court, and the jury ordered discharged, and it appearing to the court that the jury's answers to Special Issues 1, 2 and 3 should be disregarded because the findings therein contained amount to a remote cause of the injuries sustained by H. T. Arnold, in view of answers to Special Issues 33 and 34, that plaintiff's failure to keep a proper lookout at the time and place in question was the proximate cause thereof. And it further appearing to the court that other specific acts of negligence, as submitted to the jury on behalf of the plaintiff, were each answered adverse to said plaintiff, and that from the verdict as a whole, the jury has absolved both defendants from any specific acts of negligence which could constitute causal negligence resulting in the injuries to plaintiff, H. T. Arnold: it is, therefore, considered and adjudged by the court that Special Issues 1, 2 and 3 be, and they are hereby disregarded as being immaterial.

It is, therefore, Ordered, Adjudged and Decreed by the court that plaintiff, H. T. Arnold take nothing as against either Panhandle & Santa Fe Railway Co. or R. A. Billings, d/b/a Billings Freight & Baggage Transfer, and that each of said defendants recover of the plaintiff all costs in this behalf expended, for which execution may issue.

Dated and entered this ____ day of December, 1954.

—— ——, Judge Presiding.

Certificate of Service (omitted in printing).

[fol. 436a] [File endorsement omitted.]

MICROCARD

TRADE MARK ®

9756

MATTHEW BENDER & COMPANY

6763

[fol. 464] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

FIRST AMENDED MOTION FOR JUDGMENT—Filed December 15, 1954

To the Honorable James G. Denton, District Judge:

Comes now, Panhandle & Santa Fe Railway Company, Defendant in the above styled and numbered cause, and files this, its First Amended Motion for Judgment, and in such connection, would show the court as follows:

I

That in answer to Special Issues 1, 2 and 3, presented to the jury, as set forth in full in the form of Judgment attached hereto and marked Exhibit A, it was found that this defendant failed to furnish plaintiff Arnold a reasonably safe place in which to do his work; that such failure was negligence, and a proximate cause of plaintiff's injuries. These issues and the answers of the jury thereto should be disregarded in that the jury found, in answer to Special Issues 33 and 34, that plaintiff Arnold failed to keep a proper lookout for the Billings truck at the time and place in question, and that such failure was a proximate cause of the injuries, if any, sustained on January 16, 1952. The jury's findings on Special Issues 33 and 34, when taken in connection with its findings on Special Issues 1, 2 and 3, and when taken in connection with the other issues submitted to, and answered by the jury, show conclusively that plaintiff's failure to keep a proper lookout was the causal negligence which resulted in his injuries, amounting to the sole proximate cause thereof. The jury in its verdict in fact found that the only causal negligence which resulted in injuries to H. T. Arnold, was the negligence of H. T. Arnold himself, in this: in answer to [fol. 465] Special Issue No. 4, the jury found that this defendant failed to warn plaintiff Arnold of the truck as it approached, but in answer to Special Issue No. 5, they found that this was not negligence. In answer to Special

Issue No. 7, the jury found that this defendant permitted motor trucks to be driven on the area used by plaintiff Arnold in his work, but in answer to Special Issue No. 8, they found that this was not negligence. In answer to Special Issue No. 10, the jury found that Panhandle & Santa Fe Railway Co. did not fail to keep a proper lookout for the plaintiff. In answer to Special Issue No. 12, the jury found that the Billings truck driver did not fail to keep a proper lookout for plaintiff Arnold. In answer to Special Issue No. 14, it was determined that the Billings truck driver failed to give an adequate warning before backing his truck, but answering Special Issue No. 15, the jury found that such failure was not negligence. The jury found in Special Issue No. 17 that backing of the Billings truck, instead of driving it forward, was not negligence, and in Special Issue No. 19, that said truck driver did not back his truck too close to the railway cars on which plaintiff Arnold was working. In Special Issue No. 23, it was determined that the truck driver did not propel his truck in reverse at a speed in excess of that which an ordinarily prudent person would have driven under the same or similar circumstances; and in Special Issue No. 27, that said driver operated his truck without clear vision in the direction which he was driving, but that the same was not negligence. These specific findings of the jury eliminate all causal connection between specific acts of negligence as alleged by the plaintiff, and leave in the verdict the finding that Arnold's own negligence in failing to keep a proper lookout at the time and place in question, was the proximate cause of his injuries. [fol. 466] Issues Nos. 1, 2 and 3, therefore, become a remote cause, which amounts to no proximate cause, since the jury has found on specific issues that overt acts, if any, occurring at the time and place in question, did not cause plaintiff's injuries.

II

Furthermore, the jury's findings in response to Special Issues Nos. 1, 2 and 3, are immaterial and should be disregarded for these reasons:

(A). When taken in connection with specific issues submitted to the jury and answered, Special Issues Nos., 1, 2

and 3 amount to no more than a general issue, in that as outlined in Paragraph I hereof, it was found, in answer to Special Issues Nos. 4 and 5, that it was not negligence for this defendant to fail to warn plaintiff Arnold of the truck as it approached; in answer to Special Issues Nos. 7 and 8, that it was not negligence for this defendant to permit motor trucks to be driven on the area used by Arnold in his work; in answer to Special Issue No. 10, that this defendant did not fail to keep a proper lookout for the plaintiff; in answer to Special Issue No. 12 that the Billings truck driver did not fail to keep a proper lookout for the plaintiff; in answer to Special Issues Nos. 14 and 15, that it was not negligence for the Billings truck driver to fail to give an adequate warning before backing his truck; in answer to Special Issue No. 17, that backing of the Billings truck, instead of driving it forward, was not negligence; in answer to Special Issue No. 19, that the truck driver did not back his truck too close to the railroad cars on which plaintiff Arnold was working; in answer to Special Issue No. 23, that the truck driver did not propel his truck in reverse at a speed in excess of that which an ordinarily prudent person would have driven under the same or similar circumstances; and in Special Issues Nos. 27 and 28, that said truck driver operated his truck without clear [fol. 467] vision, but that the same was not negligence.

(B). Special Issues No.s 1, 2 and 3, being general issues, and the jury's answers thereto, constituting general findings, the effect thereof is completely destroyed by the jury's specific findings as above outlined, and thereby leaves Plaintiff Arnold's negligence as the sole and only proximate cause of his injuries.

III

If it be determined by the court that by the jury's answers to Special Issues Nos. 1, 2 and 3, it was found that failure to furnish plaintiff Arnold a reasonably safe place to work was other than the remote cause of plaintiff's injuries, then and in such event only, and in the alternative only, this defendant herewith and hereby requests and prays that the court render judgment for defendant Pan-

handle & Santa Fe Railway Company non obstante verdicto for the following reasons:

(A). Special Issues 1, 2, 3 and 3-A were erroneously submitted to the jury for each and all of the reasons contained in this defendant's Objections and Exceptions to the submission of such issues (such objections and exceptions having been made prior to the submission of such issues to the jury, and such are incorporated herein by reference the same as if copied in full).

(B). Such special issues are general in character and should be disregarded when taken in connection with specific issues submitted to and answered by the jury.

(C). The court should have given this Defendant's Motion for an instructed Verdict for each and all of the reasons outlined therein, and reference is hereby made to said Motion as if copied herein in full.

Wherefore, premises considered, Panhandle & Santa Fe Railway Company prays that judgment be entered by the court that plaintiff take nothing as against it, and defendant, R. A. Billings, d/b/a Billings Freight & Baggage [fols. 468-482] Transfer, based on the answers to special issues as found by the jury in form substantially in accordance with Exhibit A attached hereto and made a part hereof, or in the alternative, that the court render judgment for this defendant non obstante verdicto.

Respectfully submitted, Lewis Jeffrey, Amarillo, Texas, McWhorter, Howard, Cobb & Johnson, 607 Lubbock National Building, Lubbock, Texas, Attorneys for defendant Panhandle & Santa Fe Railway Company, By Charles L. Cobb.

Certificate of Service (omitted in printing.)

Overruled 12/17/54, James G. Denton, Judge.

EXHIBIT A TO FIRST AMENDED MOTION FOR JUDGMENT

* * * * * * *

Judgment (omitted. Printed side page 449 ante.)

* * * * * * *

[fol. 483] [File endorsement omitted.]

[fol. 484] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

PLAINTIFF'S MOTION FOR JUDGMENT—Filed December 17, 1954

To said Honorable Court:

Now comes H. T. Arnold, Plaintiff, and respectfully moves this Honorable Court to enter Judgment for the Plaintiff, H. T. Arnold, against the Panhandle & Santa Fe Railway Company, in conformity with the verdict of the jury in response to Special Issues submitted to them and in accordance with stipulations of record herein.

Gallagher, Francis, Bean, Wilson & Berry, 1010 Gulf States Building, Dallas 1, Texas, By: J. O. Bean.

[fol. 485] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

No. 23280

H. T. ARNOLD,

VS.

PANHANDLE & SANTA FE RAILWAY COMPANY, *et al.*

JUDGMENT—December 17, 1954

On the 22nd day of November, 1954, the above entitled and numbered cause having come on to be heard, appeared the Plaintiff, H. T. Arnold, in person and by his attorneys, and the Defendants, Panhandle & Santa Fe Railway Com-

pany and Third Party Defendant R. A. Billings, d/b/a Billings Freight and Baggage Transfer, by their respective attorneys, and the Plaintiff and Defendants having announced ready for trial;

Thereupon, came a jury of twelve good and lawful men of Lubbock County, Texas, composed of David E. Sherill and eleven others, who, being duly sworn and impaneled, and after hearing the pleadings, evidence, Charge of the Court and argument of the attorneys, retired to consider their verdict, and thereafter, on the 26th day of November, 1954, returned into open court their verdict in response to special issues submitted to them by the Court, their verdict having been duly considered by the Court was in all things approved and ordered filed as the verdict of the jury in said cause; said verdict being in words and figures substantially as follows:

Special Issue No. 1

Do you find from a preponderance of the evidence that on the occasion in question the defendant, Panhandle and Santa Fe Railway Company, failed to furnish the Plaintiff Arnold a reasonably safe place in which to do his work?

Answer "Yes" or "No."

Answer: Yes.

[fol. 486] Special Issue No. 2

Do you find from a preponderance of the evidence that such failure, if any, on the part of the defendant, Panhandle and Santa Fe Railway Company, was negligence?

Answer "Yes" or "No."

Answer: Yes.

Special Issue No. 3

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of the injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: Yes.

Special Issue No. 3A

Do you find from a preponderance of the evidence that such negligence, if any, was the sole proximate cause of the

injuries, if any, suffered by Plaintiff Arnold on the occasion in question?

Answer "Yes" or "No."

Answer: No.

Special Issue No. 4

Do you find from a preponderance of the evidence that on the occasion in question the Defendant, Panhandle and Santa Fe Railway Company, failed to warn the Plaintiff Arnold of the truck as it approached the Plaintiff Arnold?

Answer "Yes" or "No."

Answer: Yes.

Special Issue No. 5

Do you find from a preponderance of the evidence that such failure, if any, on the part of the Defendant, Panhandle and Santa Fe Railway Company, was negligence?

Answer "Yes" or "No."

Answer: No.

[fol. 487] Special Issue No. 7

Do you find from a preponderance of the evidence that on the occasion in question the defendant, Panhandle and Santa Fe Railroad Company, permitted motor trucks to be driven on an area used by the Plaintiff Arnold in the performance of his work?

Answer "Yes" or "No."

Answer: Yes.

Special Issue No. 8

Do you find from a preponderance of the evidence that such act in permitting such use, if any, on the part of the Defendant, Panhandle and Santa Fe Railway Company, was negligence?

Answer "Yes" or "No."

Answer: No.

Special Issue No. 10

Do you find from a preponderance of the evidence that on the occasion in question Defendant, Panhandle and Santa Fe Railway Company, failed to keep a proper lookout for the plaintiff?

Answer "Yes" or "No."

Answer: ——.

Special Issue No. 12

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver failed to keep a proper lookout for Plaintiff Arnold?

Answer "Yes" or "No."

Answer: No.

Special Issue No. 14

Do you find from a preponderance of the evidence that on the occasion in question Defendant Billings' truck driver failed to give adequate warning before backing said truck?

Answer "Yes" or "No."

Answer: Yes.

[fol. 488] Special Issue No. 15

Do you find from a preponderance of the evidence that such failure, if any, on the part of the Defendant Billings' truck driver was negligence?

Answer "Yes" or "No."

Answer: No.

Special Issue No. 17

Do you find from a preponderance of the evidence that the act of Defendant Billings' truck driver in backing said truck instead of driving forward was negligence?

Answer "Yes" or "No."

Answer: No.

Special Issue No. 19

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver backed said truck too close to the railway cars on which Plaintiff Arnold was working?

Answer "Yes" or "No."

Answer: No.

Special Issue No. 23

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver drove said truck in reverse at a speed in excess of that which an ordinarily prudent person would have driven it under the same or similar circumstances?

Answer "Yes" or "No."
Answer: No.

Special Issue No. 27

Do you find from a preponderance of the evidence that on the occasion in question the Defendant Billings' truck driver operated the truck without clear vision in the direction he was driving?

Answer "Yes" or "No."
Answer: Yes.

[fol. 489]

Special Issue No. 28

Do you find from a preponderance of the evidence that such action, if any, on the part of the Defendant Billings' truck driver was negligence?

Answer "Yes" or "No."
Answer: No.

Special Issue No. 30

Do you find from a preponderance of the evidence that the Plaintiff, H. T. Arnold, moved into the path of the Billings' truck when such movement could not be made with safety?

Answer "Yes" or "No."
Answer: No.

Special Issue No. 33

Do you find from a preponderance of the evidence that H. T. Arnold failed to keep a proper lookout for the Billings truck at the time and place in question?

Answer "Yes" or "No."
Answer: Yes.

Special Issue No. 34

Do you find from a preponderance of the evidence that Plaintiff's failure to keep a proper lookout, if he did so fail, was a proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer "Yes" or "No."
Answer: Yes.

Special Issue No. 34A

Do you find from a preponderance of the evidence that Plaintiff's failure to keep a proper lookout, if he did so fail,

was the sole proximate cause of the injuries, if any, sustained on January 16, 1952?

Answer "Yes" or "No."

Answer: No.

[fol. 490] Special Issue No. 35

Do you find from a preponderance of the evidence that the act of Plaintiff H. T. Arnold in turning his back to the Billings' truck, under the existing circumstances, was negligence?

Answer "Yes" or "No."

Answer: No.

Special Issue No. 37

Do you find from a preponderance of the evidence that the Plaintiff, H. T. Arnold, knew the danger, if any, and appreciated the risk, if any, of being struck by a backing Billings' truck at the time he moved into the driveway and walked therein?

Answer "Yes" or "No."

Answer: No.

Special Issue No. 38

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably and fairly compensate H. T. Arnold for his diminished capacity, if any, to labor and earn money up to the present time, if you find he has suffered any up to the present time, and as he may in reasonable probability undergo in the future, if you find he will undergo any in the future, and as would reasonably and fairly compensate him for such physical pain, if any, and mental anguish, if any, as he has suffered in the past, if you find he has suffered any physical pain and mental anguish in the past, and for such physical pain, if any, and mental anguish, if any, as he may in reason-probability suffer in the future, if you find that he may suffer any in the future as a direct and proximate result of the injuries, if any, sustained by him on the occasion in question?

In answering this Issue you are instructed that you cannot compensate for any physical pain, if any, or mental anguish, if any, or diminished capacity to work and earn

money, if any, resulting from any condition existing before the occurrence in question, except insofar as said condition [fol. 491] may have been aggravated by the occurrence in question, if you find that it has been aggravated.

And if you find from the evidence that since the time of Plaintiff's alleged accident that Plaintiff has suffered with ailments independently of such injuries, if any, you will exclude from your findings any suffering or loss of earnings, if any, due solely or partly to such subsequent ailments. In determining the present or cash value, you should take into consideration the highest net rate of interest to which such money could be safely and securely invested in this locality.

Answer in dollars and cents, if any.

Answer: $30,000.00.

Special Issue No. 39

How much, if any, do you find from a preponderance of the evidence, should the Plaintiff Arnold's damages, if any, be diminished as a proximate result of Plaintiff Arnold's own negligence, if any?

Answer in dollars and cents, if any.

Answer: $12,000.00.

In connection with this Issue, you are instructed if you have found in answer to the preceding Issues that the damages, if any, sustained by Plaintiff were caused in part by the negligence, if any, of the defendants, and in part by the negligence, if any, of the Plaintiff, then you will find that sum which represents the proportion that the amount of negligence, if any, attributable to Plaintiff bears to the total damages, if any, found in answer to Special Issue No. 38.

Special Issue No. 40

Do you find from a preponderance of the evidence that the injuries, if any, to the Plaintiff were not the result of an unavoidable accident?

[fol. 492] The form of your answer shall be: "It was an unavoidable accident", or "It was not an unavoidable accident."

Answer: It was not an unavoidable accident.

(S.) David E. Sheriff, Foreman.

Under the pleadings, evidence and verdict of the jury filed herein, the Court is of the opinion that the Plaintiff, H. T. Arnold, is entitled to recover judgment against the Defendant, Panhandle & Santa Fe Railway Company, for the sum of $18,000.00, with interest thereon at the rate of 6% per annum until paid.

The Court further finds that there is a stipulation filed of record herein, wherein all parties agree that the Railroad Retirement Board of the United States has a lien and is subrogated to the extent of benefits heretofore paid the Plaintiff in the amount of $1,302.00.

The Court is further of the opinion, and so finds, that the Third Party Defendant and Defendant R. A. Billings, d/b/a Billings Freight and Baggage Transfer, having been found by the jury in their answers to the special issues not guilty of any negligence proximately causing Plaintiff's injuries, and having found that the Plaintiff was contributorily negligent in failing to keep a proper lookout for the Billings truck, none of the parties herein, Plaintiff nor Defendant, Panhandle & Santa Fe Railway Company, shall recover anything from the Third Party Defendant and Defendant, R. A. Billings, d/b/a Billings Freight and Baggage Transfer;

It is, therefore, ordered, adjudged and decreed by the Court that the Plaintiff, H. T. Arnold, do have and recover judgment against the Defendant, Panhandle & Santa Fe Railway Company, for the sum of $18,000.00, with interest thereon at the rate of 6% per annum from date until paid, together with all cost in this behalf expended, and that he have his execution.

[fol. 493] It is further ordered, adjudged and decreed by the Court that the Railroad Retirement Board of the United States first have and recover of Defendant, Panhandle & Santa Fe Railway Company, and Plaintiff, out of the $18,000.00 damages awarded herein, its lien and subrogation in the amount of $1,302.00.

It is further ordered, adjudged and decreed by the Court that the Third Party Defendant and Defendant, R. A. Billings, d/b/a Billings Freight and Baggage Transfer, do have and recover from Defendant, Panhandle & Santa Fe Railway Company, all cost in this behalf expended herein, for which let execution issue.

It is further ordered, adjudged and decreed that all further relief sought herein by any of the parties hereto, except that which is hereinabove ordered, adjudged and decreed, be denied.

To all of which action of the Court the Defendant, Panhandle & Santa Fe Railway Company, excepted.

Done this 17th day of December, 1954.

James G. Denton, Judge 99th District Court of Lubbock County, Texas.

[File endorsement omitted.]

[fol. 494] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT, PANHANDLE & SANTA FE RAILWAY CO.'S MOTION FOR NEW TRIAL—Filed December 22, 1954

To the Honorable James G. Denton, District Judge:

Now comes, Panhandle & Santa Fe Railway Co., Defendant in the above entitled and numbered cause, and moves the court to set aside the judgment of the court rendered herein, and grant it a new trial for the following reasons:

1. Because the court erred in overruling this defendant's First Amended Motion for Judgment, and for each of the reasons therein stated.

2. Because the court erred in overruling the defendant's Motion for an Instructed Verdict in this case, and for each of the reasons therein stated.

3. Because the court erred in granting Plaintiff's Motion for Judgment, and entering Judgment in this cause as against defendant, Panhandle & Santa Fe Railway Co.

4. Because the court erred in basing its judgment in this cause upon the jury's answers to General Issues 1, 2 and 3.

5. Because the court erred in basing its judgment on the jury's answers to General Issues 1, 2 and 3, whereas

specific findings of the jury on Special Issues 4, 7, 10, 12, 14, 17, 19, 23 and 27, completely negatived such general findings on Issues 1, 2 and 3, and in fact found, in answer to Issues 33 and 34, that the failure of the plaintiff himself to keep a proper lookout, was a proximate cause which could have been nothing but the sole proximate cause of the injuries, if any, sustained by H. T. Arnold.

6. Because the jury's answers to Special Issues 1, 2 and 3 should have been disregarded when, as pointed out in Defendant's Exceptions to the Court's Charge, the same [fol. 495] were general issues and did not inquire of an ultimate controlling fact.

7. Because the court erred in entering judgment, whereas the jury's findings on Special Issues 33 and 34, when taken in connection with its findings on Special Issues 1, 2 and 3, and when taken in connection with the other issues submitted to and answered by the jury, show conclusively that plaintiff's failure to keep a proper lookout was the causal negligence which resulted in his injuries, amounting to the sole proximate cause thereof.

8. Because the court erred in entering judgment, whereas Issues 1, 2 and 3 could constitute no more than a remote cause which amounts to no proximate cause, especially in view of the fact that no overt act constituting negligence was committed by this defendant.

9. Because the court erred in entering judgment in this case for the plaintiff where the only findings against this defendant were contained in General Issues 1, 2 and 3, and where the effect thereof was completely destroyed by other and specific findings of the jury.

10. Because the court erred in entering judgment for the plaintiff herein, and in overruling this defendant's alternative Motion for Judgment non obstante verdicto and for each of the reasons therein stated, which reasons are incorporated herein by reference.

Wherefore, Defendant, Panhandle & Santa Fe Railway Co. prays the court that the Judgment of the court be set aside, and that it be granted a new trial herein.

Lewis, Jeffrey, Amarillo, Texas; McWhorter, Howard, Cobb & Johnson, 607 Lubbock National Build-

ing, Lubbock, Texas, Attorneys for Panhandle & Santa Fe Railway Co., Defendant. By Charles L. Cobb.

[fol. 496] [File endorsement omitted.]

[fol. 497] IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, 99TH JUDICIAL DISTRICT

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed, January 21, 1955

On this 21st day of January, 1955, at a regular term of this court, came on to be heard in this cause the Motion of defendant, Panhandle & Santa Fe Railway Company, to set aside the Judgment of the court rendered herein in favor of Plaintiff, H. T. Arnold, on the 17th day of December, 1954, in the above entitled and numbered cause, and said Motion having been duly heard and considered, the court is of the opinion that the same should be overruled;

It is, therefore, considered and ordered by the court that the Motion for a New Trial herein be, and the same is hereby in all things overruled, to which said Judgment and ruling of the court, defendant, Panhandle & Santa Fe Railway Company then and there excepted, and in open court, gave notice of appeal to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo.

Dated and entered this 21st day of January, 1955.

James G. Denton, Judge Presiding.

[File endorsement omitted.]

[fols. 498-499] Supersedeas Bond on appeal for $19,000.00 approved and filed February 2, 1955 omitted in printing.

[fols. 500-502] Request for transcript—Filed February 3, 1955 (omitted in printing.)

[fols. 503-505] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 506] IN THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO

No. 6522

PANHANDLE & SANTA FE RAILWAY COMPANY, Appellant

v.

H. T. ARNOLD, Appellee

OPINION—October 10, 1955

This suit was brought under the provisions of the Federal Employers' Liability Act, Title 45, Section 51, U. S. Code Annotated. The trial of the cause was conducted under the provisions of the federal law expressed in the act and decisions thereunder and it is recognized that the appeal must be determined by the same law. Florence J. Bailey v. Central Vermont Railway, Inc., 319 U. S. 350; Strickland Transp. Co., Inc. v. Johnston, et al., 238 S. W. 2d 717.

Appellee, H. T. Arnold, while employed as a car inspector by the Appellant, Panhandle & Santa Fe Railway Company, was injured by a truck belonging to R. A. Billings which backed into him causing the injuries for which he sued. Appellee is the sole witness as to the pertinent facts and from his undisputed testimony it is revealed that his injury was solely attributable to the truck of Billings which backed into him on a graveled passageway adjoining the cars of the appellant railway—which cars he had been inspecting. It is indisputable that had the truck of Billings not been located on the graveled passageway of the appellant ap-ellee would not have been injured. This fact

and the jury finding relevant thereto determine the correct adjudication of this appeal.

The case was tried before a jury which returned the following findings of fact:

(1) that the defendant railway company did not furnish Arnold a reasonably safe place in which to do his work which was a proximate cause of his injuries;

[fol. 507] (2) the defendant railway company was not negligent on the occasion in question in permitting motor trucks on an area used by the plaintiff Arnold in the performance of his work;

(3) it was not negligence on the part of the railway company to fail to warn Arnold of the approach of the Billings truck;

(4) the railway company did not fail to keep a proper look-out for Arnold;

(5) Billings' truck driver did not fail to keep a proper look-out for Arnold;

(6) it was not negligence for the Billings' truck driver to fail to give warning before backing his truck;

(7) it was not negligence for the truck driver to back his truck instead of going forward;

(8) the truck driver did not back his truck too close to the cars where Arnold was working;

(9) the driver did not back his truck too fast; and

(10) it was not negligence for the truck driver to back his truck without clear vision.

Appellant railway company, upon the above findings of the jury, filed its first amended motion for judgment which was overruled. Appellee's motion for judgment was granted and, on the 17th day of December, 1954, under the principle of comparative negligence, judgment was entered awarding a recovery to appellee in the sum of $18,000.00 as against appellant railway company and denying any recovery as against R. A. Billings, the truck owner. Appellant's first poin- reveals the error of the trial court as complained of in this appeal:

"The trial court erred in basing judgment on the jury's answers to the general issue finding that de-

fendant failed to 'furnish the Plaintiff Arnold a reasonably safe place in which to do his work' (Issues 1, 2 and 3); whereas, specific findings of the jury on Special Issues 4, 7, 10, 12, 14, 17, 19, 23 and 27, completely negatived such general findings on Issues 1, 2 and 3, and in fact found, in answer to Issues 33 and 34, that the failure of the plaintiff himself to keep a proper lookout, was a proximate cause which could have been nothing but the sole proximate cause of the injuries, if any, sustained by H. T. Arnold."

Of like import are appellant's second and third points of error and a ruling on the above points effects a ruling on all points presented on this appeal.

[fol. 508] The testimony of appellee renders indisputable the fact that the sole proximate cause of his injury, insofar as might be chargeable to appellant, and not to appel-ee's own contributory negligence, was the truck of Billings located on the graveled passageway. Since the jury found, under Special Issues Nos. 7 and 8 outlined under No. 2 hereinabove, that the appellant railway company was not negligent on the occasion in question in permitting motor trucks on an area used by plaintiff Arnold in the performance of his work, appellant was entitled to judgment in the trial court on such verdict. If appellee was not furnished a safe place to work by appellant, it was solely by reason of the fact that the truck of Billings was permitted in the area. If the railroad was not negligent in permitting the motor truck in the area, then it necessarily follows that it did not fail to furnish appellee a reasonably safe place in which to do his work. In any event under the jury finding, no negligence could attach to appellant by reason of the truck being in the area and the alleged consequent failure of appellant to furnish appellee a safe place to work. Without negligence on the part of appellant, it could not be liable to appellee. Benson v. Missouri, K. & T. R. Co., 200 S. W. 2d 233, writ refused; Internation-Great Northern R. Co. v. Lowry, 121 S. W. 2d 585 (Sup. Ct. Texas). Further strengthening this proposition are other jury issues in the cause. The jury found that a proximate cause of appellee's injury was his own failure to keep a proper lookout. In the total absence of negligence and causation

attributable to either the appellant railway company or to Billings' truck driver, appel-ee's failure to keep a proper look-out necessarily becomes the sole proximate cause of his injuries and he cannot recover as against the appellant railway.

The proposition above is clearly supported by the ruling in the case of Harbin et al. v. City of Beaumont, et al., 146 S. W. 2d 297. This cause rules that where appellant had pleaded specific facts invoking appellee's duty to guard a [fol. 509] hole in the street in which appellant was working, the additional allegation that appellee was guilty of negligence in failing to furnish Harbin a reasonably safe place in which to work was a legal conclusion flowing from the specific facts and was not a plea of a special act of negligence. The ruling in the case wholly sustains the opinion hereinabove on the sound prineiple that where a jury has acquitted appellant of all specific acts of negligence, a finding of the jury that the appellant was guilty of negligence in not furnishing appellee a reasonably safe place in which to work is nothing more than the jury's conclusion of law which has no support in the facts found and, therefore, cannot support a judgment. Also see Great Atlantic & Pacific Tea Co. v. Coleman, 259 S. W. 2d 319; Peeler, et al. v. Smith, 18 S. W. 2d 938, affirmed by the Supreme Court in 29 S. W. 2d 975.

The last of this state is well established that the Courts must reconcile any apparent conflict in the jury answers if the same can be reasonably done in the light of the facts of the particular case. A general finding that appellant failed to furnish appellee with a safe place to work cannot stand in the face of the specific findings of the jury exonerating both appellant railway and Billings of any negligence proximately causing appellee's injuries. Walker et al. v. Houston Electric Co., 155 S. W. 2d 973, writ of error refused; Aranda et al. v. Texas & N. O. R. Co., 140 S. W. 2d 236; Sproles et al. v. Rosen et ux., Comm. of Apps., 84 S. W. 2d 1001; El Paso Electric Co. v. Hedrick, Comm. of Apps., 60 S. W. 2d 761; Harbin v. City of Beaumont, supra.

Appel-ants points of error are sustained and the judgment of the trial court is reversed and judgment is ren-

dered that appellee take nothing by his suit as against appellant railway company.

Herbert C. Martin, A. M.

[fol. 510] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 511-512] IN THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT AMARILLO

No. 6522

PANHANDLE & SANTA FE RAILWAY COMPANY,

vs.

H. T. ARNOLD

From the District Court of Lubbock County.
Opinion by Mr. Martin, A. J.

JUDGMENT—October 10, 1955

This cause came on to be heard on the transcript of the record and the same being inspected and it appearing to the Court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and judgment be here and now entered as should have been entered in the court below.

It is accordingly ordered, adjudged and decreed that the appellee, H. T. Arnold, take nothing by reason of his suit against the appellant, Panhandle & Santa Fe Railway Company, and that the appellant go hence without day and recover its costs.

It is further ordered, adjudged and decreed that the appellee, H. T. Arnold, pay all costs in this behalf expended for which let execution issue and this decision be certified below for observance.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 513] IN THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT AMARILLO

[Title omitted]

APPELLEE'S MOTION FOR REHEARING

To the Honorable Court of Civil Appeals

Now comes Appellee, H. T. Arnold, in the above entitled cause, and respectfully requests the Court to set aside the Judgment of this Court rendered on the 10th day of October, 1955, reversing and rendering the judgment of the trial court and to grant a Rehearing herein, and says:

1

The Court of Civil Appeals erred in reversing and rendering judgment of the trial court.

2

The Court of Civil Appeals erred in applying Texas procedural law rather than federal substantive law under the Federal Employers Liability Act and decisions thereunder.

3

The Court of Civil Appeals erred in holding there was no evidence of negligence and causation attributable to Appellant railroad company.

4

The Court of Civil Appeals erred in holding that the only evidence of pertinent facts came from Appellee.

5

The Court of Civil Appeals erred in applying Texas procedural law to deny Appellee's rights under the Federal Act.

[fol. 514] 6

The Court of Civil Appeals erred in holding Appellee not entitled to judgment based on a jury finding "that De-

fendant failed to furnish the Plaintiff Arnold a reasonably safe place in which to do his work" in direct conflict with the Federal Act, which entitles Plaintiff to damages if such injuries result in whole or in part from negligence of officers, agents or employees, or due to the railroad's negligence by reason of any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

7

The Court of Civil Appeals erred in holding as a matter of law that Appellant did not fail to furnish Appellee Arnold a reasonably safe place in which to do his work.

8

The Court of Civil Appeals erred in construing a substantive right to be a procedural element in voiding the clear wording of the Federal Act.

9

The Court of Civil Appeals erred in holding Appellee's injury was solely attributable to the truck of Billings' when an abundance of testimony revealed that Appellant, in part, created unsafe working conditions.

10

The Court of Civil Appeals erred in holding Appellant's first point, quoted as follows, reveals error:

> "The trial court erred in basing judgment on the jury's answers to the general issue finding that defendant failed to 'furnish the Plaintiff Arnold a reasonably safe place in which to do his work' (Issues 1, 2 and 3); whereas, specific findings of the jury on Special Issues 4, 7, 10, 12, 14, 17, 19, 23 and 27, completely negatived such general findings on Issues 1, 2 and 3, and in fact found, in answer to Issues 33 and 34, that the failure of the plaintiff himself to keep a proper lookout, was a proximate cause which could have been nothing but the sole proximate cause of the injuries, if any, sustained by H. T. Arnold."

11

The Court of Civil Appeals erred in sustaining Appellant's second point holding that Appellee's negligence was [fol. 515] the sole proximate cause.

12

The Court of Civil Appeals erred in sustaining Appellant's third point holding that a general finding by the jury of unsafe place was destroyed by specific findings.

13

The Court of Civil Appeals erred in holding that if the railroad was not negligent in permitting the motor truck in the area, then it necessarily follows that it did not fail to furnish Appellee a reasonably safe place in which to do his work.

14

The Court of Civil Appeals erred in holding Appellee's failure to keep a proper lookout was the sole proximate cause of his injury when the jury found his negligence to be only a proximate cause, which finding diminished rather than destroyed damages under comparative negligence law.

15

The Court of Civil Appeals erred in holding that there was a total absence of negligence and causation attributable to either the Appellant railroad company or to Billings' truck driver.

16

The Court of Civil Appeals erred in holding proper lookout to be a specific issue.

17

The Court of Civil Appeals erred in holding that the so-called specific issue on lookout nullified finding of unsafe place as authorized by the Federal Act.

18

The Court of Civil Appeals erred in holding that the jury's finding of unsafe place was a general finding when

it was submitted in accordance with the provisions of the Federal Employers Liability Act.

19

The Court of Civil Appeals erred in holding finding of [fol. 516] unsafe place cannot stand in face of the specific findings exonerating both Appellant and Billings' truck driver when such so-called specific findings were in answer to evidentiary issues covering only portions of the evidence.

20

The Court of Civil Appeals erred in failing to follow the rule announced by the Supreme Court of the United States in Federal Employers Liability Act cases, which rule supersedes the laws of the several states and provides that no substantive right of any party may be impaired by any local statute, rule of decision or form of local practice.

21

The Court of Civil Appeals erred in failing to follow the Federal rule (substantive law) announcing that what constitutes negligence for the statute's purpose is a federal question and does not vary in accordance with different conceptions of negligence under state laws.

22

The Court of Civil Appeals erred in holding that the Federal Employers Liability Act did not require the employer to furnish its employees a safe place to work.

23

The Court of Civil Appeals erred in holding that issue of unsafe place was not proper, under Texas special issue practice, it being a federal question as to whether or not there was an issue, as well as the character and amount of evidence required to establish negligence.

Wherefore, Appellee, H. T. Arnold, respectfully prays that this Motion For Rehearing be granted; that upon hearing the judgment heretofore rendered by this Honor-

able Court be set aside and that the judgment of the trial court be affirmed.

Respectfully submitted, Gallagher, Francis, Bean, Wilson & Berry, J. O. Bean, 1010 Gulf States Building, Dallas 1, Texas, Attorneys for Appellee.

[fol. 517] Proof of service (omitted in printing.)

[fols. 518-520] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 521] IN THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO

PANHANDLE & SANTA FE RAILWAY COMPANY,

7957/6522

vs.

H. T. ARNOLD

From the District Court of Lubbock County.
Per Curiam.

PER CURIAM ORDER OVERRULING APPELLEE'S MOTION FOR REHEARING—Filed November 7, 1955

This day came on to be heard the motion by the appellee for a rehearing and the same, having been duly considered by the Court, is hereby in all things overruled.

Clerk's Certificate to foregoing paper omitted in printing.

[fols. 522-530] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 531] IN THE SUPREME COURT OF TEXAS

H. T. ARNOLD, Petitioner,

v.

PANHANDLE & SANTA FE RAILWAY COMPANY, Respondent

PETITION FOR WRIT OF ERROR ON BEHALF OF H. T. ARNOLD, APPELLEE, IN CAUSE NO. 6522, IN THE COURT OF CIVIL APPEALS FOR THE 7TH SUPREME JUDICIAL DISTRICT OF TEXAS AT AMARILLO, WHEREIN PANHANDLE & SANTA FE RAILWAY COMPANY IS APPELLANT AND H. T. ARNOLD IS APPELLEE—Filed December 6, 1955

To the Supreme Court of Texas:

Statement of the Case

The opinion of the Court of Civil Appeals correctly but does not clearly state the nature and result of this suit. This suit, under the Federal Employers' Liability Act, is [fol. 532] for personal injuries suffered by a railway employee while inspecting cars, engaged in interstate commerce, when hit by a truck operated at the direction of the railway on a narrow passageway on railway premises, which narrow passageway was owned, constructed, operated, controlled and maintained by the railway. The jury found the railway's negligence in failing to furnish its employee a safe place to work proximately caused his injuries and assessed his damages at $30,000, which was reduced by a comparative negligence finding to $18,000. The jury exonerated the truck owner of negligence.

Statement of Jurisdiction

The Supreme Court has jurisdiction of this case under subdivisions 2, 3 and 6 of Article 1728, R. C. S. of Texas for 1925.

Points of Error

First Point

The error of the Court of Civil Appeals in reversing and rendering favorable judgment based on favorable

jury verdict by application of local rules and forms of practice and procedure to circumvent and defeat Petitioner's federal substantive rights under the Federal Employers' Liability Act. (Germane to Paragraphs 1, 2, 5, 6, 8, 18, 20, 21, 22 and 23, Appellee's Motion for Rehearing.)

[fol. 533] Second Point

The error of the Court of Civil Appeals in holding that the issue of "unsafe place" was not a correct and proper submission of an ultimate fact in a Federal Employers' Liability Act case tried in State Court. (Germane to Paragraphs 7, 10, 12, 13, 18, 22 and 23, Appellee's Motion for Rehearing.)

Third Point

The error of the Court of Civil Appeals in holding that the jury finding of "unsafe place" was a general finding destroyed by specific findings. (Germane to Paragraphs 12, 13, 14, 16, 17, 18 and 19, Appellee's Motion for Rehearing.)

Fourth Point

The error of the Court of Civil Appeals in holding that there was no evidence of negligence or causation attributable to the railroad. (Germane to Paragraphs 3, 4, 9, 13, 14, 15 and 21, Appellee's Motion for Rehearing.)

Fifth Point

The error of the Court of Civil Appeals in sustaining Appellant's First, Second and Third Points since Appellant made no proper objection to the submission of "unsafe place" issue and thereby waived any errors. (Germane to Paragraphs 1, 7, 10, 11, 16, 19 and 23, Appellee's Motion for Rehearing.)

[fol. 534] First Point—(Restated)

The error of the Court of Civil Appeals in reversing and rending favorable judgment based on favorable jury verdict by application of local rules and forms of practice and procedure to circumvent and defeat Petitioner's federal substantive rights under the Federal Employers' Liability Act. (Germane to Paragraphs 1, 2, 5, 6, 8, 18, 20, 21, 22 and 23, Appellee's Motion for Rehearing.)

Statement, Argument and Authorities Under First Point

Pertinent provisions of the Federal Employers' Liability Act, *Title 45, U. S. C. A., Sections 51 and 53,* on which cause was submitted to the jury and judgment entered, provide:

Section 51:

> "Every common carrier by a railroad, while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injuries while he is employed by such carrier * * * for such injury or death resulting in whole or in part "from the negligence of any of the officers, agents or employees * * *
> "or
> "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, [fol. 535] track, roadbed, works, boats, wharves or other equipment."

Section 53:

> "Contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Ultimate fact issues, under the quoted section of the Act regarding defect or insufficiency of equipment, roadbed, etc., on the railway's premises, were submitted by the District Court to the jury in Special Issues Nos. 1, 2, and 3 (Tr. 57-58), in answer to which the jury found the railway "failed to furnish Arnold a reasonably safe place in which to do his work" due, at least in part, to its negligence, which was a proximate cause.

The District Court, as authorized by the first quoted section of the Act regarding negligence of officers, agents or employees of the railway, submitted Special Issues Nos. 4 through 11A (Tr. 58), in answer to which the jury found that the railway permitted the truck to be driven on area used by Arnold and failed to warn him, but neither was negligence.

Other Special Issues Nos. 12 through 29A (Tr. 65) inquired about the negligence of the truck owner and driver, in answer to which the jury exonerated the owner and driver of negligence; however, it found elements creating more hazardous working place and conditions for Arnold [fol. 536] in that it found that the driver "failed to give adequate warning", and "operated the truck without clear vision."

Special Issues Nos. 30 through 37 (Tr. 67) inquired about the contributory negligence of the employee Arnold, all of which were answered in his favor except the jury found his negligence in failing to keep a proper lookout for the truck was a proximate cause but not the sole cause (Special Issues Nos. 33, 34 and 34A).

In answer to Special Issues Nos. 38 and 39 (Tr. 70-71) the jury assessed Arnold's damages at $30,000.00, reduced by $12,000.00 due to his contributory negligence.

Notwithstanding an abundance of testimony regarding construction, operation and control of the narrow passageway on the railway premises, placing its cars for Arnold's inspection on a track adjoining the narrow passageway, and the railway's direction that the truck use the narrow passageway in the manner that it was being used at the time (S. F., pages 187, 192, 198, 200, 201, 324, 336), the Court of Civil Appeals substituted its finding for that of the jury and held that there were two sole proximate causes, (1) "that the sole proximate cause of his injury * * * was the truck of Billings' located on the gravel passageway," and (2) "Appellee's failure to keep a proper lookout necessarily becomes the sole proximate cause of his injuries," contrary to the jury finding that it was only *a proximate cause.*

[fol. 537] We quote from the record an abundance of testimony regarding unsafe working place and conditions created, in part, and controlled by the railway:

H. T. Arnold Testifies:

S. F. 7, l. 10-13:

> "Q. Now, what is the width of the surface or walkway from the West side of the—or the spur rail to the grass over here?
>
> "A. Ten feet and eight inches."

S. F. 8, l. 23-25—S. F. 9, l. 1-2:

"Q. Who was in the car when you went through it, anybody?

"A. When I entered this car there were four or five men, Santa Fe men, railroad men, throwing mail out on a truck, R. A. Billings' truck, parked on the West side."

S. F. 11, l. 8-12:

"Q. What weight truck was it, capacity truck rather?

"A. I would say approximately two-ton.

"Q. What did it have on the side, anything?

"A. The side of the bed was metal up practically as high as your head and it was topped over with some kind of metal boards."

S. F. 11, l. 18-25:

"Q. Was it covered with anything?

"A. Yes, sir.

[fol. 538] "Q. What?

"A. The top was covered with canvas at that time.

"Q. How high up in the truck did the mail come?

"A. Approximately six feet.

"Q. Sufficiently high, was it, to cover the window in the cab?

"A. Yes, sir."

S. F. 19, l. 1-6:

"Q. Mr. Arnold, how wide is that truck?

"A. I never measured the truck, but I will say eight feet, maybe a few inches over.

"Q. How wide, please sir, is that walk-way that he tried to back that truck over?

"A. Eight feet—ten feet eight inches."

S. F. 19, l. 23-25:

"Q. And the truck was how wide?

"A. Eight feet, or eight feet and a few inches.

"Q. That would leave a clearance of a foot or so on each side?"

S. F. 20, l. 12-15:

"Q. Could he go in front of the station?
"A. He could and has.
"Q. Once or more than once?
"A. Lots of times."

[fol. 539] S. F. 21, l. 24-25—S. F. 22, l. 1-2:

"Q. Would there be any way that that driver, when he straightened up his truck, could see you or anybody else going along that car?
"A. No, sir."

S. F. 25, l. 19-22:

"Q. Will a truck with rubber tires on that hard pavement or hard surface make any noise coming back, rolling or driving along, other than the motor?
"A. *I would say a very light noise, if any.*"

S. F. 26, l. 14-25—S. F. 27, l. 1-4:

"Q. *Now have you at any time before you got hurt called it to the attention of the agent in charge of the station area?*
"A. Yes, sir.
"Q. About those trucks?
"A. Yes, sir.
"Q. What did you tell him?
"A. I told him it was dangerous the way he backed up along there.
"Q. Who was the agent?
"A. Mr. H. C. Humphrey.
"Q. Is he still in charge here?
"A. Yes, sir.
"Q. *Did he make any reply to that notice?*
"A. *He agreed with me that it was dangerous.*
[fol. 540] "Q. But thereafter, and notwithstanding, was the practice continued of trucks coming up?
"A. Yes, sir."

S. F. 27, l. 24-25—S. F. 28, l. 1-3:

"Q. In the handling of that truck, in backing out, has he ever come in contact with the coaches standing there?

"A. That truck has bent several handholds on the side of the cars, in fact he broke one one time while I was on duty and I had to send the car to Slaton for repairs."

S. F. 71, l. 9-16:

"Q. Now Mr. Arnold, you stated awhile ago that you had some conversations with somebody with the railroad about how dangerous it was for a truck to be backing along that area, didn't you?

"A. That's right, yes, sir.

"Q. So you had observed it, and had consciously thought about that as dangerous, hadn't you?

"A. Everybody else thought it, yes, sir."

S. F. 72, l. 10-16:

"Q. And as you say that drive-way is about ten feet eight inches, is that correct?

"A. Yes, sir.

"Q. You think the truck is about eight feet wide?

"A. I would say eight to eight and a half, whatever is a standard truck I suppose. I don't know the exact width of it, but standard width truck."

[fol. 541] S. F. 72, l. 21-24:

"Q. Two light posts, and a man backing up there would have to be a pretty good driver to even stay on that road, wouldn't he?

"A. That's right, he would."

R. A. Billings Testifies:

S. F. 324, l. 11-16:

"Q. I will ask you, Mr. Billings, whether or not you had specific instructions from the Railroad Company about whether or not you were to proceed to the North out of that area?

"A. We had specific instructions not to proceed North, or on the concrete course way, which was where the passengers loaded on the inbound-outbound trains at any time."

S. F. 336, l. 5-11:

"Q. *Well they said to use this passageway and no other?*

"A. *That's correct.*

"Q. *They built that for you?*

"A. *That's correct.*

"Q. Whatever the hazard is, the company itself and not you made it, is that right, the railroad company?

"A. If there was a hazard."

S. F. 338, l. 1-23:

"Q. If he was further towards the left, further towards the left wheel from the side of the truck, he would not be visible?

"A. No, sir, if he is behind the truck he is not visible?

[fol. 542] "Q. It would have been a safer transaction if that had been a couple of feet wider, wouldn't it? A safer place for you to work on?

"A. Well not necessarily, no, sir.

"Q. If you go down there with, I think seven feet eight inches, there is only about two feet and one inch clearance, a foot for either side, isn't that true——

"A. Yes, sir.

"Q. —arithmetic?

"A. Yes, sir.

"Q. So a man can't stand between, if he is going down the middle, he can't stand between the edge of the car and the truck without being hit?

"A. *No, he can not.*

"Q. *That sounds not very safe, doesn't it?*

"A. *From the sound of it it sounds not, but we use lots more narrower drives than that.*

"Q. *Well, I say if you increased the driveway, the width, it would be a safer proposition obviously, wouldn't it?*

"A. *Possibly so, yes, sir.*"

S. F. 339, l. 6-9:

"Q. How full did you fill those trucks?
"A. As full as possible.
"Q. Up to the top, huh?
"A. *Yes, sir, from the bottom to the top.*"

[fol. 543] S. F. 340, l. 2-9:

"Q. And could it prohibit you from one side rather than the other of unloading mail?
"A. Yes, sir.
"Q. Did it exercise that authority over you and your driver?
"A. Yes, sir.
"Q. Could it direct the speed at which you would enter and leave if it wanted to?
"A. Yes, sir, it could."

S. F. 341, l. 11-18:

"Q. In other words, as far as you are concerned, you were compelled to go out the way you came in?
"A. You have got—you are compelled to either—if you back in you will drive out and if you drive in you will back out.
"Q. It was a matter with you of taking what they made for you, is that right.
"A. Correct."

H. C. Humphrey Testifies:

S. F. 187, l. 5-8:

"Q. What reason did you have for widening that out and gravelling it?
"A. Well, to be used by mail trucks in loading and unloading mail from the baggage car that sits on the pullman spur."

[fol. 544] S. F. 192, l. 13-22:

"Q. If you put that truck in the middle of the drive way, like you are driving down the center of the road, there won't be a foot on either side, will there by measurement?

"A. I believe there would be.

"Q. If one of your men is coming out from between those cars, and they do come out that way don't they?

"A. Well, it is not absolutely necessary I don't think.

"Q. How would they get out in case they are connecting an air hose?

"A. Well, I wouldn't get out."

S. F. 192, l. 25—S. F. 193, l. 1-14:

"Q. How would you get out?

"A. Well, I wouldn't expect the truck and the man to occupy the drive-way at the same time.

"Q. What's that?

"A. I wouldn't expect the truck and the man to occupy the walk-way at the same time.

"Q. One of them has got to give away, don't they?

"A. Just like any other drive I should think.

"Q. And that is used by your laborers down there isn't it, that walk-way?

"A. Well, you mean in performance of their duties.

"Q. Yes, sir.

"A. I assume that they would walk up and down there.

[fol. 545] "Q. And if one is on the other has got to get off?

"A. That is true, yes."

S. F. 196, l. 8-25:

"Q. Well, if you step out there you are going to get hit, aren't you?

"A. I imagine you would, if a truck was coming and you stepped out in front of it.

"Q. And the driver is not looking and is coming backwards, it creates a dangerous situation doesn't it?

"A. I wasn't present. I don't know just what you are——

"Q. I am asking you and you can answer me, I believe.

"A. What is your question?

"Q. My question is this: the actual measurement of

that walkway there w-ere the truck goes back, call it what you want, is ten feet and seven inches—eight inches, steel tape measurement?

"A. I never did measure it.

"Q. Will you assume that for this question to be correct?

"A. Yes, sir.

"Q. Because it has been measured. Now the truck occupies virtually all of the passageway, does it not?"

S. F. 197, l. 12-18:

"Q. Well, I will tell you. Suppose he is coming back, backing that truck back there now with that [fol. 546] clearance of a foot or so from the edge of the car, with your man coming—going in and out of cars, don't you know that it is a dangerous situation for the man?

"A. It would be dangerous for anybody to step out from behind the truck."

S. F. 198, l. 12-22:

"Q. Your men, your railroad men, load it out of the cars and you can load it out on a baggage wagon, can't you?

"A. Yes, we could, but it would require a little more delay.

"Q. A little extra work would save a life, or save an injury. It has been done down there that way, hasn't it?

"A. We have always unloaded the mail out of the cars direct, the Lubbock mail, the Star Route mail, we'd put it on the baggage trucks.

"Q. You can load the mail on baggage wagons and haul it out like the express, can't you?

"A. It is possible."

S. F. 200, l. 2-5:

"Q. Now couldn't you have built, if you are going to use trucks on this, couldn't you have built that four or five feet wider?

"A. Yes, we could have built as wide as a highway, if we had thought it necessary."

S. F. 201, l. 7-11:

"Q. Can you drive in front of that station and go around that way?

"A. You mean is it possible to drive on the platform?

[fol. 547] "Q. Yes, sir.

"A. It is possible, but it is not permissible."

S. F. 205, l. 1-7:

"Q. (By Mr. Smith) Mr. Humphrey, I believe you stated that your instructions, in other words the instructions of the railway company to Mr. Billings was that he should use this drive-way that was constructed for him in unloading those baggage cars, is that correct?

"A. That's right. Would it be objectionable if I explained to you kinda what the procedure was, why it was built."

S. F. 205, l. 24, and S. F. 206, l. 1-9:

"Q. Did you construct a one-way drive?

"A. Yes, we did.

"Q. Was there any provision made for a truck driving in from the South end and out at the North end?

"A. No, a provision to drive in from the South end and leave from the South end only.

"Q. Did you instruct the Billings' drivers that they should not drive out from the North across your platform?

"A. Absolutely. The same was true when we were loading and unloading from the other side."

S. F. 206, l. 21-25:

"Q. I will ask you whether or not you ever saw a Billings' truck whizzing backwards at 15 miles an hour in that area?

"A. No, I never did see them going that fast.

[fol. 548] "Q. Did you ever see them going fast backwards out of that area?"

S. F. 207, l. 1-2:

"A. Well, I judge a fellow couldn't back out of there too fast because it is not wide enough. He would hit that car."

S. F. 208, l. 16-23:

"Q. Would it have been safer from the light of passing experience to have built a little run-around like you sometimes have in front of your private home garages, where that truck could turn around and come out safely, head on, where the driver could see where he was going, could you have built that run-around?

"A. It is possible, by dispensing with part of the park you could have."

G. W. Culwell testified as follows:

S. F. 240, l. 20-25, and S. F. 241, l. 1-9:

"Q. Well I am just going on your rule that if a truck is coming back there like that, like you say you saw, and your men are working around these cars, whether your rule is really true here, that you didn't require your employees to subject themselves to hazards and danger. Now, what do you say?

"A. I didn't say he had to be working there when the truck was there.

"Q. Must he go home when the truck comes?

"A. No, he has got other work to do.

"Q. Must he leave what he is doing when a truck arrives?

"A. There is no specified time as to when these cars are to be inspected during the day.

[fol. 549] "Q. Do you want him to go out on the grass and sit down until those trucks get out of there?

"A. No."

Joe T. Stone testified as follows:

S. F. 379, l. 10-14:

"Q. Were you speeding at all backwards?

"A. No, I wasn't. I just had pulled backwards and

was very slowly coming out, on account of it is an awful tight place.

"Mr. Gallagher: Awful what?

"A. Tight place."

S. F. 386, l. 5-13:

"Q. You did know that it was necessary that people were working around those cars, inspectors?

"A. Well, at times.

"Q. And they were apt to come in and out of those cars at any time while you were there, you knew that didn't you?

"A. Yes, sir.

"Q. And they work up and down the sides of those cars, you knew that didn't you?

"A. Yes, sir."

S. F. 387, l. 19-24:

"Did you get in from the right or the left side?

"A. I got in from the left side of the car.

"Q. And then you started back right away?

"A. Yes.

[fol. 550] "Q. Did nothing else?

"A. Nothing else."

S. F. 392, l. 4-5:

"Q. That means you didn't blow your horn?

"A. I don't recall blowing my horn, no."

S. F. 394, l. 5-14:

"Q. And you had sideboards upon that truck, didn't you?

"A. Yes.

"Q. Sidings up?

"A. Yes.

"Q. With canvas over all of it?

"A. Yes, sir.

"Q. Stacked high with mail wasn't it?

"A. Yes."

Thus we see that a truck eight feet and maybe a few inches wider was being driven quietly backwards without

vision or warning on a narrow passageway ten feet and eight inches wide. The truck was not only permitted but directed to use this narrow passageway by the railway, which exercised authority over the truck driver regarding loading, direction and speed, telling the driver in substance, "If you back in, drive out—if you drive in, back out." In other words, both the truck and the employee were occupying a space admittedly of insufficient width. "If one is on, [fol. 551] the other has got to get off." The driver was not permitted by the railway to turn around or drive in front of the station.

The Court of Civil Appeals, by substituting its finding for that of the jury in holding contributory negligence a complete defense, rendered a take nothing judgment for this injured railway employee, whereas liability under the Act is based on comparative negligence. This holding is contrary to the highest authority of our land regarding comparative negligence. The Supreme Court of the United States holds that this federal substantive right must be uniformly applied in state and federal courts alike and cannot be defeated by the forms of local practice. What constitutes negligence, character and amount of evidence required, whether or not there is an issue for the jury and what is a proper issue are not matters of procedure but substantive rights to be liberally construed, not varying in the courts with different conceptions under state laws and rules. Under the Act, the employer is required to furnish a safe place and safe appliances. Unsafe place issue has been upheld many times. The Supreme Court of the United States has affirmed such substantive rights of railway employees in cases where state tribunals, by application of local forms of practice, rendered against the employee.

In *Brown* v. *Western Ry. Co. of Alabama*, 338 U. S. 294, 70 S. Ct. 105, in reversing a Georgia court, which [fol. 552] followed strict local rules of construction, Justice Black said:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of

local practice. Should this Court fail to protect federally created rights from dismissal because of overexacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."

Bailey v. *Central Vermont Railway, Inc.*, 319 U. S. 350, 63 S. Ct. 1062-3:

"(¼) Section 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' The rights which the Act creates are federal rights protected by federal rather than local rules of law."

Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740. Action for death of railway switch tender struck on head by mail hook swinging from side of car of another railroad. Evidence that it was very dark, that surrounding ground was high and uneven and that the area was entirely within the control of the employer was sufficient for jury to determine whether the conditions constituted an unsafe and dangerous working place and whether such conditions contributed, in part, to switch tender's death.

Ellis v. *Union Pacific Ry. Co.*, 329 U. S. 649, 67 S. Ct. 598. Employee was crushed between moving railway car and a building. Clearance was once adequate but was impaired by subsequent extension of the building by its owner over which the respondent had no control. The nearness of the track to the building created an unsafe place to work. Liability based on negli- [fol. 553] gence is a federal question created by federal rights.

Carter v. *Atlantic and St. Andrews Bay Ry. Co.*, 338 U. S. 430, 70 S. Ct. 226. Supreme Court reversed trial court, who charged jury that if employee's injury was proximately caused by his own negligence, verdict should be for the railway. The charge violated direct command of Congress that liability exists if injury results in whole or in part from employer's negligence.

Wilkerson v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413.

In reversing Utah Court in action for switchman's injuries from falling from chained-off, narrow, greasy boardway, Supreme Court said that, under Act, jury should hold employer liable for conditions under his control, when conditions are such as a reasonable man ought not to maintain in the circumstances, care being commensurate with dangers of business.

Blair v. *B. & O. Ry. Co.*, 323 U. S. 600, 65 S. Ct. 545. Negligence of employer may be determined by viewing conduct as a whole, especially where elements are interwoven and form a single pattern, each imparting character to the other. Employee was injured by sliding pipe on handtruck located on uneven place.

Eubanks v. *Thompson*, 334 U. S. 854, 68 S. Ct. 1528. Brakeman riding step of engine and flagging approaching motorist was crushed when automobile ran into engine. Arkansas Court held motorist's negligence sole proximate cause. Evidence that bell was not rung, whistle not blown and fireman not in cab raised issue of negligence against railroad.

Stone v. *N. Y. C. & St. Ry. Co.*, 344 U. S. 407, 73 S. Ct. 358. In reversing Missouri Court, which found no causation, Supreme Court held case peculiarly one for the jury where straw boss ordered employee to pull harder on tie. There was evidence of casual connection for trier of facts.

[fol. 554] The Supreme Court of the United States denied certiorari, where employees obtained judgment, in the following cases:

Copeland v. *Terminal Railroad Association of St. Louis*, 182 S. W. 2d 600 (Supreme Court of Missouri). Employee was instantly killed when crushed between railroad car and loading platform of another company. Defendant contended employee's negligence in placing himself in a place of danger was sole proximate cause. Court refused to submit this theory which was held not raised.

Chicago & E. I. R. Co. v. *Waddell*, 323 U. S. 732, 65 S. Ct. 69. Employee was injured when motor car derailed at a public crossing. Crossing was maintained

by local authorities, except intersection, which was under control of railroad. Derailment was caused by rocks which lodged in flange space. Court ruled it was a jury question because rocks would have passed through if the space had been open.

T. & P. Ry. Co. v. *Riley,* 325 U. S. 873, 65 S. Ct. 1414 (Texas Case, 183 S. W. 2d 991). Employee was killed by falling ties from flatcar when he cut the wire support. Jury found that the supports were weakened by employees other than the deceased and that the defendant negligently failed to furnish deceased a reasonably safe place to work. (Supreme Court, by denial of certiorari, affirmed submission of safe place issue in Texas.)

Griswold v. *Gardener,* 329 U. S. 725, 67 S. Ct. 74. Death from switching operation. There was no proof as to how or why deceased appeared in the place where he was run over by moving cars. Defendant assigned error on instruction that it was defendant's duty to use ordinary care in furnishing safe place. Court held that whether the pushing of the string of cars which caused the death in the manner related amounted to negligence was for the jury. What constitutes a rea- [fol. 555] sonably safe place to work, negligence and proximate cause are jury questions under the Act. (One justice stated Supreme Court converted Act into compensation law making railroads insurors of employees.)

Fleming v. *Husted,* 333 U. S. 843, 68 S. Ct. 661. Instructions to jury "that defendant had permitted depot platform to be in a defective, dangerous and uneven condition and allowed depression to remain therein" were not improper submitting issue of negligence too broadly.

Our Texas Courts have held this to be a federal substantive right not impaired by local statute, rule of decision or form of local practice:

T. & P. Ry. Co. v. *Younger,* 262 S. W. 2d 557 (C. of C., Ft. Worth) (Ref. N. R. E.);

Morris v. *T. & N. O. Ry. Co.,* 269 S. W. 2d 565 (C. of C., Beaumont) (Ref. N. R. E.).

A right created by federal law shall be uniformly enforced by the various states. Clearly under all the above cited cases, insufficient clearance, construction and creation of the hazardous situation, which was under the control and direction of the railway, raises the issue of unsafe place.

Second Point—(Restated)

The error of the Court of Civil Appeals in holding that the issue of "unsafe place" was not a correct and proper submission of an ultimate fact in a Federal Employers' [fol. 556] Liability Act case tried in State Court. (Germane to Paragraphs 7, 10, 12, 13, 18, 22 and 23, Appellee's Motion for Rehearing.)

Statement, Argument and Authorities Under Second Point

Whether or not the employer failed to furnish its employee a safe place to work consfitutes a correct and proper submission of an ultimate fact issue, being a question of substantive law determined by the Act and decisions thereunder. Arnold's place of work was a safe place until his employer constructed a narrow passageway, too narrow for Arnold and the truck to occupy at the same time. His employer directed the truck to use that passageway and no other. It is clear that the railway, by such construction, operation and control, created, at least in part, a hazardous and unsafe place to work.

One of the main purposes of the Act was to modify common law barriers against recovery by an employee against and employer predicated on industrial accidents. In addition to the authorities cited under the First Point, the following hold that the employer is required to furnish his employee a safe place to work, and that the issue of unsafe place as submitted to the jury by the District Court is a proper issue:

Seaboard A. L. Ry. Co. v. *Horton,* 233 U. S. 492, 34 S. Ct. 635;

[fol. 557] *Dice* v. *Akron, Canton & Youngstown R. Co.,* 342 U. S. 359, 72 S. Ct. 312;

Thompson v. *Bowles,* 123 F. 2d 487, 8th Cir.;

Urie v. *Thompson,* 337 U. S. 163, 69 S. Ct. 1018;

Chicago M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 46 S. Ct. 564;

Chicago Rock Island & Pacific Ry Co. v. *Lint,* 217 F. 2d 279, 8th Cir.;
Beattie v. *Elgin Joliet & Eastern Ry. Co.,* 217 F. 2d 863, 7th Cir.;
Virginia Ry. Co. v. *Staton,* 84 F. 2d 133, 4th Cir.;
Chicago G. W. Ry. Co. v. *Peeler,* 140 F. 2d 865, 8th Cir.;
Shiffler v. *Pa. Ry. Co.,* 176 F. 2d 368, 3rd Cir.;
Fugazzi v. *S. P. Co.,* 208 F. 2d 205, 9th Cir.;
Terminal Railroad Association of St. Louis v. *Fitzjohn,* 165 F. 2d 473, 8th Cir.;
Ft. Worth D. C. Ry. Co. v. *Smith,* 206 F. 2d 667, 5th Cir.;
Larsen v. *Chicago N. W. Ry. Co.,* 171 F. 2d 841, 7th Cir.;
Brimberg v. *No. Pac. Ry.,* 14 N. W. 2d 410 (Cert. denied), 323 U. S. 752, 65 S. Ct. 87;
Terminal Railroad Association of St. Louis v. *Schorb,* 151 F. 2d 361 (Cert. denied), 66 S. Ct. 470, 8th Cir.

[fol. 558] Third Point—(Restated)

The error of the Court of Civil Appeals in holding that the jury finding of "unsafe place" was a general finding destroyed by specific findings. (Germane to Paragraphs 12, 13, 14, 16, 17, 18 and 19, Appellee's Motion for Rehearing.)

Fourth Point—(Restated)

The error of the Court of Civil Appeals in holding that there was no evidence of negligence or causation attributable to the railroad. (Germane to Paragraphs 3, 4, 9, 13, 14, 15 and 21, Appellee's Motion for Rehearing.)

Statement, Arguments and Authorities Under Third and Fourth Points

The Federal Act governs the measure of carrier's liability regarding safe place, negligence issues, sufficiency of evidence and whether or not the employer failed to furnish a safe place to work is an issue clearly authorized by the Act. The only difference in Special Issue No. 1 and the quoted portions of the Act under the First Point is that the Issue used the words "failed" and "safe place,"

whereas the Act used the words "defect" or "insufficiency" in its * * * premises.

The elements found by the jury in favor of the railway, (1) that it was not negligent in permitting the truck to use the passageway, nor (2) in failing to warn (Tr. 58-65), cannot destroy findings of unsafe place because such findings are based on only two evidentiary elements, whereas, [fol. 559] there were many other evidentiary elements, such as passageway constructed by the railway (S. F., pages 181, 187, 205, 335, 336), train or cars placed on track adjoining passageway for inspection by the employee (S. F., pages 187, 193), direction of the use of the passageway by the truck (S. F., pages 323, 324, 330, 340), construction of one-way passageway of insufficient width (S. F., pages 188, 191, 330, 338, 341), lack of clearance (S. F., pages 323, 336, 337, 338), no room to turn around (S. F., pages 323, 341), not permitted to go around in front of the station (S. F., pages 323, 324), too narrow to be occupied by the mail truck and the employee at the same time, where one had to give way to the other (S. F., page 193); all under the railway's control, on its premises. Taken as a whole (as in *Blair* v. *B. & O. Ry.*, 323 U. S. 600, 65 S. Ct. 1528), where the several elements are so closely interwoven as to form a single pattern and where one element imparts character to the other, clearly the jury had a right and obviously did take into consideration the overall scope of construction, maintenance, control and instructed use by the railway of its premises (S. F., pages 323, 324), the nature of the tasks involved, the hazards entailed, such as footing, clearance or lack of space on one-way passageway (S. F., page 193). The jury had ample evidence to find that the railway's negligence, at least in part, proximately caused the injuries. The facts here are much stronger than the cases where the employees were found dead on railway premises and where the jurys' [fol. 560] verdicts were based on circumstances (*Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740; *Griswold* v. *Gardner*, 155 F. 2d 333, cert. denied, 329 U. S. 725, 67 S. Ct. 74; *Tennant* v. *Peoria and P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409).

The fact that the jury found the railway not negligent

in permitting motor trucks to be driven on an area used by the plaintiff Arnold in the performance of his work and also found the railway not negligent in failing to warn the plaintiff Arnold of the truck as it approached him shows conclusively that the finding of "unsafe place" was not based on those elements but on other facts, any one of which elements, as detailed above, supports the jury findings.

Mr. Arnold, by selecting state tribunal, did not by that amend or modify his substantive rights under the Federal Act. Had he selected federal court tribunal, the general charge on unsafe place admittedly would have been proper. If he is entitled to such a submission in federal court, uniform interpretation of the Federal Act and substantive rights thereunder dictates that he is entitled to the same issue in state court. As presented under the First Point, there are two methods upon which an injured employee may recover for his injuries negligently inflicted. One is just as good as the other. The first deals with negligent conduct of officers, agents and employees, which theory was submitted to the jury under Special Issues Nos. 4 through 11A, which the Court of Civil Appeals termed "specific." The second way, and the one last [fol. 561] mentioned in the Act and submitted to the jury under Special Issues Nos. 1, 2 and 3, which the Court of Civil Appeals designated "general," deals with defects, deficiency or lack of sufficiency of material objects maintained, owned, controlled and supervised by the railway, such as railway cars, roadbeds, passageway, equipment, etc. The denial of one, no negligence of employees, does not and will not amount to denial of the second, unsafe place.

The issues were answered as follows:

> Special Issue No. 1: The railway failed to furnish safe place.
>
> Special Issue No. 4: That the railway failed to warn the plaintiff, (5) but that it was not negligence.
>
> Special Issue No. 7: That the railway permitted motor trucks to be driven on an area used by the plaintiff Arnold in the performance of his work, (8) but that it was not negligence.

Special Issue No. 10: That the Defendant did not fail to keep a proper lookout.

Special Issue No. 12: That the Billings driver did not fail to keep a proper lookout.

Special Issue No. 14: That the Billings driver failed to give adequate warning, (15) but that it was not a proximate cause.

Special Issue No. 17: That the Billings driver was not negligent in backing the truck instead of going forward.

Special Issue No. 19: That the Billings driver did not back the truck too close to the railway cars.

[fol. 562] Special Issue No. 23: That the Billings driver did not back the truck faster than a person of ordinary care would back it.

Special Issue No. 27: That the Billings driver operated the truck without clear vision to the rear, (28) but that it was not negligence.

Special Issue No. 33: Arnold failed to keep proper lookout, (34) which the jury found to be negligence (35) and *a* proximate cause (36) but not the sole proximate cause.

The issue of unsafe place can be no more general than the issue which the jury found against the employee on lookout. What is proper lookout? Does it not include various elements such as surrounding conditions, clearance, noises or lack of noises, whether the passageway is straight or curved, level or unlevel, elevated or in a gorge, knowledge of presence of train cars and trucks, open or hidden view in front or behind, condition of weather, raining or dry, foggy or clear, smoky or dusty, and some knowledge of the hazard to keep a lookout for?

As stated in two Texas decisions in which writs of error were refused (*T. & P. Ry. Co.* v. *Younger*, 262 S. W. 2d 557; *Morris* v. *T. & N. O.*, 269 S. W. 2d 565), and a long series by the Supreme Court of the United States, it has been repeatedly held to be a federal substantive right that it is the employer's duty to furnish a safe place and failing to do so raises the issue of unsafe place as specifically authorized by the Act. The issue and the character and amount of evidence required are federal matters of sub-

[fol. 563] stance under the Act and are not to be impaired by state laws, rules or forms of local special issue practice.

The Court of Civil Appeals, in taking away this railway employee's substantive rights, granted under the Act, as found by the jury, substituted itself as trier of facts in nullifying jury findings essentially as follows:

Jury Findings	Court of Civil Appeals Findings
1. Railway negligent.	Not negligent.
2. On evidence.	None.
3. Unsafe place.	Not so—legal conclusion.
4. Truck owner not negligent.	Solely due presence of truck.
5. Contributory negligence of employee's failure on lookout, A proximate cause.	Sole proximate cause.
6. Employee's negligent lookout diminished recovery.	Complete defense, no recovery.
7. $30,000.00, damages.	Nothing.
8. Reduced under comparative negligence finding by $12,000.00 to $18,000.00.	Complete defense, no recovery.
9. No sole proximate cause.	Two sole proximate causes.

The trial court held under the pleadings, evidence and verdict that the employee was entitled to judgment. The [fol. 564] Court of Civil Appeals held, due to local practice peculiar to spec ı issue forms, the employee had no favorable jury finding and would take nothing. Thus the Amarillo Court of Civil Appeals by invasion denied jury trial and declared a nullity the legal processes and substantive rights granted by Congress.

Fifth Point—(Restated)

The error of the Court of Civil Appeals in sustaining Appellant's First, Second and Third Points since Appellant made no proper objection to the submission of "unsafe place" issue and thereby waived any errors. (Germane

to Paragraphs 1, 7, 10, 11, 16, 19 and 23, Appellee's Motion for Rehearing.)

Statement, Argument and Authorities Under Fifth Point

Special Issue No. 1 (Tr. 57):

> "Do you find from a preponderance of the evidence that on the occasion in question, the defendant, Panhandle and Santa Fe Railway Company, failed to furnish the plaintiff Arnold a reasonably safe place in which to do his work?"

Railway, Defendant below, made the following general objections:

> "The Defendant objects and excepts to Special Issue No. 1, because the same as submitted, amounts to a general Issue; the said Issue does not confine the question to any particular time or any particu-[fol. 565] lar place; the Issue permits the jury to speculate on probabilities." (Tr. 42.)

Rule 274, Rules of Civil Procedure, provides, in part:

> "Any complaint as to an * * * issue * * * shall be waived unless specifically included in the objections."

The Federal Employers' Liability Act, Title 45, Section 51, declares railway's liability for injuries inflicted in whole or in part by reason of "any defect or insufficiency due to its negligence," referring to equipment and premises. This was the exact and correct inquiry of Special Issue No. 1.

A general objection of general issue is no objection:

Frozen Foods Express v. *Odom,* 229 S. W. 2d 92;
Texas Coca-Cola Bottling Co. v. *Wimberly,* 108 S. W. 2d 860;
Panhandle & Santa Fe Ry. Co. v. *Friend, et ux.,* 91 S. W. 2d 922;
Gulf, C. & S. F. Ry. Co. v. *Bouchillon,* 186 S. W. 2d 1006.

Issue submitted substantially in the language of the statute is sufficient:

St. L. S. F. & T. Ry. Co. v. *Ussery*, 259 S. W. 2d 75 (C. C. A. Dallas, Er. Ref.);

[fol. 566] *Texas Employers' Insurance Assn.* v. *Watkins*, 135 S. W. 2d 297 (304) (C. C. A. Ft. Worth—no writ history);

Traders and General Ins. Co. v. *Boysen*, 123 S. W. 2d 1017 (1027) (C. A. A. Beaumont—no writ history);

Traders and General Ins. Co. v. *Blancett*, 96 S. W. 2d 420 (425) (C. C. A. Ft. Worth—writ dis.);

Traders and General Ins. Co. v. *Garry*, 118 S. W. 2d 340 (344), affirmed by Texas Supreme Court, 143 S. W. 2d 370.

United States Congress has legislated upon rights and liabilities of interstate carriers and their employees, 45 U. S. C. A., Sections 51, 52 and 53, which Act and decisions thereunder have created rights which shall not be defeated by forms of local practice. The Federal Act says the railway is liable if it fails to furnish its employees a safe place. The jury said it failed its duty in that respect.

Wherefore, Petitioner submits that the judgment of the Court of Civil Appeals is erroneous in the respects herein shown, and, therefore prays that this Court will grant a Writ of Error to the Court of Civil Appeals to review its decision, and that upon final hearing this Court will reverse the judgment of the Court of Civil Appeals and affirm the [fol. 567] judgment of the trial court, and will render such judgment as the law demands to the end that justice may be done.

Respectfully submitted, Gallagher, Francis, Bean, Wilson & Berry, J. O. Bean, 10th Floor Gulf States Bldg., Dallas 1, Texas, Attorneys for Petitioner.

Proof of service (omitted in printing.)

[fol. 568-570] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 571] IN THE SUPREME COURT OF TEXAS

ADDITIONAL AUTHORITIES HOLDING POWER OF JURY TO DRAW INFERENCES IS GREATER UNDER FEDERAL ACT THAN IN COMMON-LAW ACTIONS—Filed January 9, 1956

The Supreme Court of the United States, in Raymond G. Cahill v. New York, New Haven and Hartford Railroad Company, 76 S. Ct. 180 (advance sheet), on November 21, 1955, Per Curiam, granted certiorari and reversed judgment, without comment, of the Court of Appeals, 2nd Cir., reported in 224 F. 2d 637. This was an action for injuries sustained by a railroad brakeman, who, while he was standing behind a train stopped in highway traffic lane, [fol. 572] was struck by a truck, which had been stopped behind the train and which started suddenly. Among other things, plaintiff charged the railroad with negligence in failing to provide him with a safe place to work. In jury trial plaintiff obtained a $90,000 verdict on which judgment was rendered in his favor. The Court of Appeals, in reversing this judgment, held the evidence insufficient to support jury finding of negligence in failing to provide him with a safe place to work. It further held, "The sole cause of his injury was the negligence of the truck driver."

The Supreme Court, in reversing the Court of Appeals, without comment, apparently followed the dissenting opinion of Frank, Circuit Judge. This dissenting opinion cited many decisions, which are contained in Petitioner's original Application for Writ of Error, with these additional authorities supporting the theory that the jury's power to draw inferences in this type of action is greater than in common-law actions:

Jesionowski v. *B. & M. R. Co.*, 329 U. S. 452, 67 S. Ct. 401;
Lillie v. *Thompson*, 332 U. S. 459, 68 S. Ct. 140;
Affolder v. *N. Y. C. & St. L. R. Co.*, 339 U. S. 96, 70 S. Ct. 509;
Smalls v. *Atlantic Coast Line R. Co.*, 348 U. S. 946, 75 S. Ct. 439;
Ruddy v. *N. Y. Central R. Co.*, 224 F. 2d 96.

[fol. 573] It is respectfully submitted that this recent case by the United States Supreme Court and the cases therein cited, which were based upon parallel or similar fact situations, allow jury inferences of greater scope than the inferences drawn by the jury in the case presently under consideration. There is, therefore, no longer an "absence of a federal decision on a parallel fact situation" from which state courts may be guided on this federal question.

Wherefore, premises considered, Petitioner prays that the Writ of Error be granted and that upon final hearing the judgment of the Court of Civil Appeals be reversed and the judgment of the Trial Court be affirmed.

Respectfully submitted, Gallagher, Francis, Bean, Wilson & Berry, J. O. Bean, 10th Floor Gulf States Bldg., Dallas 1, Texas, Attorneys for Petitioner.

[fol. 574] Proof of service (omitted in printing.)

[fol. 575] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 576] IN THE SUPREME COURT OF TEXAS

No. A-5577

H. T. ARNOLD

vs.

PANHANDLE & SANTA FE RAILWAY COMPANY

From Lubbock County, Seventh District

ORDER REFUSING APPLICATION FOR WRIT OF ERROR—
Filed March 14, 1956

This day came on to be heard the application of petitioner for a writ of error to the Court of Civil Appeals for the Seventh District and the same having been duly considered,

and the Court having determined that the application presents no error which requires the reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be refused; that the applicant, H. T. Arnold, pay all costs incurred on this application.

[fol. 577] [File endorsement omitted.]

[fol. 578] IN THE SUPREME COURT OF TEXAS

[Title omitted]

From the Court of Civil Appeals at Amarillo, Texas

MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR —Filed March 29, 1956

To the Supreme Court of Texas:

Now comes H. T. Arnold, Petitioner herein, and files this, his Motion for a Rehearing of his Application for Writ of Error, and moves the Court to set aside its judgment and order of March 14, 1956, refusing Petitioner his Writ of Error in this case, no reversible error, and upon rehearing to grant said Application for Writ of Error for the following reasons:

[fol. 579] Grounds Relied on for Rehearing

I

The Court of Civil Appeals erred in reversing and rendering favorable judgment based on favorable jury verdict by application of local rules and forms of practice and procedure to circumvent and defeat Petitioner's federal substantive rights under the Federal Employers' Liability Act.

II

The Court of Civil Appeals erred in holding that the issue of "unsafe place" was not a correct and proper sub-

mission of an ultimate fact issue in a Federal Employers' Liability Act case tried in a State Court.

III

The Court of Civil Appeals erred in holding that the jury finding of "unsafe place" was a general finding which was destroyed by specific findings.

IV

The Court of Civil Appeals erred in holding that there was no evidence of negligence or causation attributable to the railroad.

V

The Court of Civil Appeals erred in sustaining Appellant's First, Second and Third Points since Appellant made no proper objection to the submission of "unsafe place" issue and thereby waived any errors.

Statement in Support of Grounds

Although Petitioner does not agree on the grounds as [fol. 580] above set forth with this Honorable Court's refusing Petitioner's Application for Writ of Error, Petitioner readily agrees with the reasoning of this Honorable Court in making the notation "no reversible error" insofar as this notation means that the Court of Civil Appeals did not correctly declare the law. One glaring mis-statement of the law and its application is the finding of the Court of Civil Appeals that there were *two sole proximate causes* of Petitioner's injuries when the law is very clear that there can be only *one* sole proximate cause.

This is a case which was brought under the Federal Employers' Liability Act, and there is abundant authority to the effect that findings that the employer failed to furnish a safe place to work, which failure was negligence and proximately caused the injuries to the plaintiff, would support a judgment in favor of plaintiff regardless of other findings. In this case, the jury of course found that Respondent did fail to furnish Petitioner a safe place in which to perform his duties. This finding was completely supported by evidence, including that to the effect that (1) the passageway where the Petitioner was struck was under the

control of Respondent; (2) the passageway was constructed by Respondent; (3) cars were placed on the track adjoining the passageway by Respondent which cars Respondent instructed Petitioner to inspect; (4) Respondent directed the truck to use the passageway; (5) the passageway was of insufficient width to allow clearance both for a person and a truck; (6) there was no room for a truck to turn around and go out forward but a truck *out* to back out; and (7) Respondent did not provide a smaller vehicle to pick up the mail.

[fol. 581] The Court of Civil Appeals further stated that the finding of "unsafe place" was destroyed by the specific fact findings that Respondent was not negligent in permitting the truck to use the passageway or in failing to warn Petitioner. This is certainly not the law, for as stated above this is a proper issue in a Federal Employers' Liability Act case and a favorable finding on this issue alone is sufficient to support a verdict for an injured employee. "Unsafe place" embraces many elements not covered in failing to warn or in permitting the truck to use the passageway. There would have been no need for a warning and it would have been all right for the truck to have used the passageway had the place of work furnished by Respondent to Petitioner been safe; but since Respondent failed to furnish Petitioner a safe place in which to perform his duties, Respondent should be liable for the injuries received by Petitioner.

Further, the Court of Civil Appeals apparently ignored the mandatory comparative negligence doctrine imposed by the Federal Employers' Liability Act, by that court's apparent holding that the negligence of Petitioner would defeat a recovery by him rather than merely diminishing his recovery in the amount found by the jury.

Clearly, the end result of the judgment of the Court of Civil Appeals is that that Court substituted its findings for that of the jury. This jury was obviously not made up of impassioned and prejudiced men but twelve clear-minded and clear-thinking jurors who carefully considered the evidence and answered the issues submitted accordingly. This is true without question in view of the jury's [fol. 582] findings of only $30,000 as Petitioner's damages when Petitioner is a totally and permanently disabled man

which award of damages was diminished by the sum of $12,000 by the jury by reason of Petitioner's contributory negligence. The law is clear that the Court of Civil Appeals should not substitute its conclusions under such circumstances for the verdict of the jury.

Petitioner in his Application for Writ of Error and in his additional authorities in support of his Application for Writ of Error cited numerous authorities involving cases brought under the Federal Employers' Liability Act where the injured plaintiff had been denied a recovery because of the State Court's application of local rules of procedure which destroyed the injured plaintiff's rights under the Federal Employer's Liability Act. In nearly every one of these instances the injured plaintiff had to go to the Supreme Court of the United States to have his substantive rights restored. Petitioner herein feels that in this day and time when the Federal Government is usurping so much of the State's powers that the State should take every possible precaution to insure the upholding of the substantive rights of its citizens rather than having its citizens go to the Federal Government to have these rights upheld, and in this connection Petitioner sincerely submits that in the instant case that this Honorable Court should grant his Application for Writ of Error in order that this Court could consider the substantive rights of Petitioner rather than forcing Petitioner to pursue his remedy to the Supreme Court of the United States to right the wrong done by the Court of Civil Appeals.

[fol. 583] Wherefore, premises considered, Petitioner respectfully prays that this Motion for Rehearing be granted, that the petition for Writ of Error be granted, and that upon hearing the judgments of the Courts below that the judgment of the Court of Civil Appeals be reversed and that of the trial court be affirmed.

Respectfully submitted, Gallagher, Francis, Bean, Wilson & Berry, Gulf States Building, Dallas, Texas; Williams & Akin 505 North Ervay, Dallas, Texas, Attorneys for Petitioner; By Henry D. Akin, Jr., Of Counsel.

Proof of service (omitted in printing).

[fols. 584-586] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 587] IN THE SUPREME COURT OF TEXAS

ORDER OVERRULING MOTION FOR REHEARING FOR APPLICATION FOR WRIT OF ERROR—Filed April 11, 1956

This day came on to be heard the motion for rehearing of application for writ of error, same having heretofore been submitted to the Court, and after due consideration, it is ordered that the said motion be, and is hereby, overruled.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 588] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 589] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

No. 240

[Title omitted]

ORDER ALLOWING CERTIORATI—Filed October 8, 1956

The petition herein for a writ of certiorari to the Supreme Court and the Court of Civil Appeals, Seventh Supreme Judicial District of the State of Texas is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
JUL 9 1956
JOHN T. FEY, Clerk

No. 240

In the

Supreme Court of the United States

OCTOBER TERM

H. T. ARNOLD,
Petitioner,

v.

PANHANDLE & SANTA FE RAILWAY CO.,
Respondent.

PETITION FOR CERTIORARI

HENRY D. AKIN, JR.,
505 North Ervay,
Dallas, Texas,
Counsel of Record for Petitioner.

J. O. BEAN,
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Dallas, Texas

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No. .....

In the

Supreme Court of the United States

OCTOBER TERM

H. T. ARNOLD,

Petitioner,

v.

PANHANDLE & SANTA FE RAILWAY CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT AMARILLO, JOINTLY OR IN THE ALTERNATIVE.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, H. T. ARNOLD, prays that a writ of certiorari issue to review jointly and in the alternative the judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo entered

in the above entitled cause on October 10, 1955 (Petitioner's motion for rehearing in said cause having been denied by said Court of Civil Appeals on November 7, 1955), and the order of the Supreme Court of the State of Texas entered in the above entitled cause on March 14, 1956, refusing Petitioner's Application for Writ of Error, Petitioner's Motion for Rehearing such Application for Writ of Error in said cause having been denied on April 11, 1956.

I. REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo (R. C 1-4), printed in Appendix A hereto, infra., Page 21, is reported in *283 S. W. 2d 303*. The order of the Court of Civil Appeals denying the motion for rehearing (R. F 1), printed in Appendix B hereto, infra., Page 29, is not reported. The order of the Supreme Court of Texas denying Petitioner's Application for Writ of Error (R. J 1), printed in Appendix B hereto, infra., Page 30, is not reported.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The final judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo was rendered and entered on October 10, 1955, Appendix B hereto, infra., Page 27 (R. D 1). The order denying Petitioner's Motion for Rehearing by said Court of Civil

Appeals was rendered and entered on November 7, 1955, Appendix B hereto, infra., Page 29 (R. F 1).

2. The order of the Supreme Court of Texas refusing Petitioner's Application for Writ of Error was rendered and entered on March 14, 1956, Appendix B hereto, infra., Page 30 (R. J 1) . The order denying Petitioner's Motion for a Rehearing of his Application for a Writ of Error by the Texas Supreme Court was rendered and entered on April 1, 1956, Appendix B hereto, infra., Page 31 (R. J 1).

3. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (3), since a right and privilege is specially set up and claimed under the Constitution and Statutes of and under authority exercised under the United States and under 45 U. S. C., 51, et seq.

III. QUESTIONS PRESENTED

1. Whether the failure of a railway company to furnish its injured employee a reasonably safe place in which to work is a proper jury question upon which a judgment can be entered in an action brought in a State Court under the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.?*

2. Whether a state Appellate Court in an action brought under the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.*, may disregard the jury's findings, which are supported by the evidence, that a railway company negligently failed to furnish injured employee a reasonably safe place to work, proximately causing his injuries,

and consider only the jury's answers to issues which negatived negligence of the railway company in some other respects?

3. Whether under the Federal Employer's Liability Act the jury has a greater power to draw inferences than under the common law?

IV. STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.*, and more specifically involved in this petition is that portion of *45 U. S. C., Section 51*, which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's

parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

V. STATEMENT

1. MATERIAL FACTS:

Petitioner, H. T. Arnold, during the regular course of his employment for Respondent, Panhandle & Santa Fe Railway Co., sustained serious and permanent injuries when he was struck by a truck being owned by Billings and operated by Billings' employee, which truck was being operated upon railroad property under the directions and orders of Respondent.

Petitioner instituted this suit in the District Court of Lubbock County, Texas, under the Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq., against the Panhandle & Santa Fe Railway Co. to recover damages for the injuries sustained by him. Plaintiff alleged that the defendant railway company was negligent in failing to furnish him a reasonably safe place in which to work as an employee of the railway company, and further alleged that the railway company was negligent in several other respects.

The evidence showed that Petitioner was struck by said Billings' truck on a ten-foot gravel passageway constructed by the railway company, which truck was more than eight

feet wide; that the passageway was thus of insufficient width; that trains or cars were placed on the track adjoining the passageway by Respondent for inspection by Petitioner at the same time the Billings' truck was unloading mail from the mail car on the train; that Respondent directed the truck to use the passageway which was one-way, lacked clearance, and had no room in which to turn around; that the truck in picking up the mail was not permitted to go out forward around in front of the station after picking up the mail, but if it drove in forward as it did, it had to back out as it did; that the passageway was too narrow to be occupied by the mail truck and Petitioner at the same time; that all was under the railway company's direction, control, and on its premises; and that the railway company had knowledge of the dangerous condition created by virtue of said combination of circumstances.

Based upon the pleadings and evidence, the trial court submitted to the jury certain special issues and in answer to those concerning the negligence of the railway company, the jury found that the railway company negligently failed to furnish plaintiff a reasonably safe place in which to do his work, proximately causing his injuries, but that the railway company was not negligent in permitting the truck to use the passageway, in failing to warn plaintiff of the truck as it approached him, or in keeping a proper lookout for plaintiff. The jury further found that plaintiff failed to keep a proper lookout for his own safety, proximately causing his injuries, and exonerated the truck

owner of negligence. The jury assessed plaintiff's damages at Thirty Thousand Dollars, which sum was reduced on a comparative negligence basis, to the sum of Eighteen Thousand Dollars. Upon this verdict the Trial Court rendered a judgment for plaintiff in the sum of Eighteen Thousand Dollars, from which judgment the railway company duly perfected its appeal to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo.

Upon appeal, the Court of Civil Appeals disregarded the jury's findings in regard to the defendant railway company's failure to furnish plaintiff with a safe place in which to do his work, and rendered judgment for defendant. The Supreme Court of Texas refused to grant Petitioner's Application for Writ of Error and thereby refused to review the judgment of the Court of Civil Appeals.

2. HOW FEDERAL QUESTION WAS PRESENTED IN THE STATE COURTS.

The Constitutional and Federal questions forming the basis of this petition to this Honorable Court were urged upon the State Courts as follows:

A. TRIAL COURTS.

Petitioner first raised a Federal question by his original petition filed in the Trial Court which petition alleged in Paragraph 1:

> "That defendant, Panhandle & Santa Fe Railway Co., is a railroad corporation duly incorporated and

of Billings' when an abundance of testimony revealed that Appellant, in part, created unsafe working conditions."

"11. The Court of Civil Appeals erred in sustaining Appellant's second point holding that Appellee's negligence was the sole proximate cause."

"12. The Court of Civil Appeals erred in sustaining Appellant's third point holding that a general finding by the jury of unsafe place was destroyed by specific findings."

"18. The Court of Civil Appeals erred in holding that the jury's finding of unsafe place was a general finding when it was submitted in accordance with the provisions of the Federal Employers' Liability Act."

"20. The Court of Civil Appeals erred in failing to follow the rule announced by the Supreme Court of the United States in Federal Employers' Liability Act cases, which rule supersedes the laws of the several states and provides that no substantive right of any party may be impaired by any local statute, rule of decision or form of local practice."

The Court of Civil Appeals overruled Petitioner's Motion for Rehearing.

3. SUPREME COURT OF TEXAS.

After Petitioner's Motion for Rehearing was overruled by the Court of Civil Appeals, Petitioner duly filed its Application for Writ of Error to the Supreme Court of Texas. In this Application, Petitioner brought forward the following points of error:

"FIRST POINT. The error of the Court of Civil Appeals in reversing and rendering favorable judgment based on favorable jury verdict by application of

local rules and forms of practice in procedure to circumvent and defeat Petitioner's Federal substantive rights under the Federal Employers' Liability Act.

"SECOND POINT. The error of the Court of Civil Appeals in holding that the issue of 'unsafe place' was not a correct and proper submission of an ultimate fact in a Federal Employers' Liability Act case tried in the State Court.

"THIRD POINT. The error of the Court of Civil Appeals in holding that the jury finding of 'unsafe place' was a general finding destroyed by specific findings.

"FOURTH POINT. The error of the Court of Civil Appeals in holding that there was no evidence of negligence or causation attributable to the railroad."

The Supreme Court refused Petitioner's Application for Writ of Error, and Petitioner filed a Motion for Rehearing, which again brought to the attention of the Supreme Court of Texas the points brought forward in Petitioner's Application for Writ of Error. The Supreme Court of Texas subsequently overruled Petitioner's Motion for Rehearing of his Application for Writ of Error.

VI. REASONS FOR GRANTING THE WRIT

1. The decision of the Texas Court of Civil Appeals and the refusal of the Supreme Court of Texas to grant an Application for Writ of Error are not in accord with the applicable decisions of this Court.

The decision of the State Courts herein is in direct conflict with the holdings of this Court such as in *Cahill v. New York, New Haven & Hartford Railroad Co., 76 S. Ct. 180 (1955); Lillie v. Thompson, 332 U. S. 459 (1947);*

Smalls v. Atlantic Coast Line R. Co., 348 U. S. 946 (1955), and *Schulz v. Pennsylvania R. Co., 76 S. Ct. 134 and 608*, which hold that it is a question for a jury to determine whether an employer under the Federal Employer's Liability Act is liable for injuries to an employee by virtue of the employer's failing to furnish the employee a reasonably safe place in which to do his work, particularly where the employer has knowledge of the dangerous condition existing.

2. The action of the Texas Court of Civil Appeals and the Texas Supreme Court constituted an invasion of the province of the jury contrary to the Seventh Amendment to the United States Constitution.

As set forth in the Statement hereof, clearly the evidence raised the issue of whether or not the defendant railway company failed to furnish Petitioner a reasonably safe place in which to do his work, from which evidence the jury was more than justified in making a favorable finding to plaintiff on this issue, together with finding that such failure constituted negligence and was the proximate cause of Petitioner's injuries and resulting damages. Thus, the Court of Civil Appeals' holdings that the jury's finding that the Respondent failed to furnish Petitioner a reasonably safe place in which to do his work constituted a conclusion of law having no factual support, and that the plaintiff's failure to keep a proper lookout for his own safety constituted the sole proximate cause of his injuries, where the jury had found that such failure on plaintiff's

part constituted only a proximate cause, clearly constitute invasions of the jury's province, which invasions certainly are in abrogation of the decisions of this Court, particularly those decisions to the effect that the jury's power to draw inferences is greater under the Federal Employer's Liability Act than at common law.

Lavender v. Kurn, 327 U. S. 645 (1946);

Jesionowski v. Boston & Maine R. Co., 329 U. S. 452 (1947);

Ellis v. Union Pacific R. Co., 329 U. S. 649 (1947);

Lillie v. Thompson, supra, 332 U. S. 459 (1947);

Wilkerson v. McCarthy, 336 U. S. 53 (1949);

Affolder v. N. Y. C. & St. L. R. Co., 339 U. S. 96 (1950);

Smalls v. Atlantic Coast Line R. Co., supra, 348 U. S. 946 (1955) reversing 216 F. 2d 842 (4th Cir., 1954);

Cahill v. N. Y., New Haven & Hartford R. Co., 76 Sup. Ct., 180;

Schulz v. Pennsylvania R. Co., 76 Sup. Ct., 134 and 608;

Griswold v. Gardener, 329 U. S. 725, 67 S. Ct. 74.

Where an injured railway employee has been deprived of his constitutional right of trial by jury, this Honorable

Court has many times made this deprivation the basis for granting Writs of Certiorari.

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54 (1943);

Bailey v. Central Vermont Ry. Co., 319 U. S. 350 (1943);

Tenant v. Peoria and P. U. Ry. Co., 321 U. S. 29 (1944);

Lavender v. Kurn, supra, 327 U. S. 645 (1946);

Jesionowski v. Boston and Maine R. R., supra, 329 U. S. 452 (1947);

Ellis v. Union Pacific R. Co., supra, 329 U. S. 649 (1947);

Myers v. Reading Co., 331 U. S. 477 (1947);

Wilkerson v. McCarthy, supra, 336 U. S. 53 (1949);

Carter v. Atlantic and St. Andrew's Bay Ry. Co., supra, 338 U. S. 430 (1949);

Moore v. Chesapeake & O. R. Co., 340 U. S. 573 (1951);

Smalls v. Atlantic Coast Line R. Co., supra, 348 U. S. 946 (1955), reversing 216 F. 2d 842 (4th Cir., 1954);

Cahill v. N. Y., New Haven & Hartford R. Co., 76 S. Ct., 180;

Schulz v. Pennsylvania R. Co., 76 S. Ct., 134 and 608.

Therefore, it is respectfully submitted that the Court of Civil Appeals in taking away this railroad employee's substantive rights granted under the Federal Employer's Liability Act, as found by the jury, substituted itself as tryer of facts, thereby invading the province of the jury contrary to the rights of Petitioner as granted Petitioner under the Seventh Amendment to the Constitution of the United States.

3. With regard to the interpretation of the Federal Employer's Liability Act, the opinion of the Court of Civil Appeals raises an important question of Federal Law which has not been, but should be, specifically determined by this Court.

The Court of Civil Appeals held as a matter of law, and contrary to the findings of the jury, that the failure of Petitioner to keep a proper lookout for his own safety constituted the sole proximate cause of his injuries. This holding was made in face of the evidence which Petitioner respectfully contends conclusively showed that his injuries were not only caused in part by, but were proximately caused by the failure of Respondent to furnish Petitioner a reasonably safe place in which to do his work.

However, the Federal Employer's Liability Act states that every railroad shall be liable in damages for injury resulting in whole or in part from the negligence of the railroad. Thus, the question is presented as to whether or not in cases tried under the Federal Employer's Liability Act the issue of whether or not the employee's in-

juries were proximately caused by the negligence of the railroad is properly submitted to the jury, or whether the test is merely if such negligence "in part" caused such injuries.

Cases by this Honorable Court such as *Griswold v. Gardener, 329 U. S. 725, 67 S. Ct. 74; Cogswell v. Chicago & E. I. R. Co., 328 U. S. 820; Coray v. Southern Pacific Co., 335 U. S. 520; Carter v. Atlantic & St. Andrew's Bay Ry. Co., 338 U. S. 430;* and *Spokane & M. & R.R. v. Campbell, 241 U. S. 497,* indicated that the question of proximate cause in the common law sense should not be in a case brought under the Federal Employer's Liability Act. This indication should certainly be clarified by a specific holding by this Honorable Court since it is an important question of Federal Law which has not been, but should be, determined by this Court.

4. The questions here presented have great importance in far reaching effect.

There are many, many thousands of employees who, when they might have the misfortune of being injured in the course and scope of their employment for a railroad company, will of necessity have their claims determined in both State and Federal Courts under the terms and provisions of and decisions rendered under the Federal Employer's Liability Act, and the possible claims of all these individuals will certainly be affected by the decision of the Court below with such decision more particularly

affecting the rights and claims of those individuals who had the misfortune of being injured in Texas.

For this reason alone, it is essential that this Honorable Court grant this Writ in order to rectify the inequitable situation created by the decision of the Court of Civil Appeals and in effect approved by the Supreme Court of Texas.

5. The decision of the Texas Court of Civil Appeals with effectual approval by the Supreme Court of Texas was clearly erroneous.

As incidentally pointed out hereinabove, the holding of the Texas Court of Civil Appeals that the jury's finding in regard to "unsafe place" is a conclusion of law with no support in the evidence, and that plaintiff's injuries were solely attributable to his own failure to keep a proper lookout, are clearly erroneous, inasmuch as the jury's findings, contrary to these holdings, were clearly supported by the evidence.

In addition, the Court of Civil Appeals erroneously held that the issue of "unsafe place" was merely a conclusion of law which should not have been submitted to the jury, and this holding is clearly in direct conflict with holdings of this Honorable Court, not to mention numerous holdings by many of the Federal Courts of Appeal. *Seaboard A. L. Ry. Co. v. Horton, 233 U. S. 492, 34 S. Ct. 635; Dice v. Akron, Canton & Youngstown R. Co., 342 U. S. 359, 72 S. Ct. 312; Urie v. Thompson, 337 U. S. 163, 69 S. Ct.*

1018; Brimberg v. Northern Pacific Railway, 14 N. W. 2d 410 (Certiorari Denied), 323 U. S. 752, 65 S. Ct. 87; and *Terminal Railroad Association of St. Louis v. Schore, 151 Fed. 2d 361 (Certiorari Denied), 66 S. Ct. 470.*

Further, the Court of Civil Appeals was conclusively in error in holding that the specific findings that the railway company was not negligent in permitting the truck to use the passageway, and in failing to warn Petitioner, and in keeping a proper lookout for Petitioner, destroyed the finding that Respondent failed to furnish Petitioner a reasonably safe place in which to do his work; since there was an abundance of evidence besides that directed to the issues where no negligence was found by the jury to exist, to the effect that the railway company had created a dangerously narrow passageway which, when coupled with the manner in which it had directed the truck to use the passageway, created an extremely unsafe place in which to work, which evidence is more fully set forth in the statement hereinabove.

Taken as a whole (as in *Blair v. B. & O. Ry., 323 U. S. 600, 65 S. Ct. 1528*), where the several elements are so closely interwoven as to form a single pattern and where one element imparts character to the other, clearly the jury had a right and obviously did take into consideration the overall scope of construction, maintenance, control and instructed use by the railway of its premises, the nature of the tasks involved, the hazards entailed, such as footing, clearance or lack of space on the one-way passageway,

in determining that the railway company had failed to furnish Petitioner a reasonably safe place in which to perform his work.

Without a doubt, this is a prime example where in "Federal Employer's Liability Act cases that an indifferent or unfriendly attitude had permeated with a philosophy hostile to that reflected in the legislation. (Mr. Justice Douglas, Stare Decisis, 49 Col. L. Rev., 735, 752.)

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court Below

COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO

No. 6522

PANHANDLE & SANTA FE RAILWAY COMPANY, Appellant

v.

H. T. ARNOLD, Appellee

October 10, 1955

This suit was brought under the provisions of the Federal Employers' Liability Act, Title 45, Section 51, U. S. Code Annotated. The trial of the cause was conducted under the provisions of the federal law expressed in the act and decisions thereunder and it is recognized that the appeal must be determined by the same law. Florence J. Bailey v. Central Vermont Railway, Inc., 319 U. S. 350; Strickland Transp. Co., Inc. v. Johnston et al, 238 S. W. 2d 717.

Appellee, H. T. Arnold, while employed as a car inspector by the Appellant, Panhandle & Santa Fe Railway Company, was injured by a truck belonging to R. A. Billings which backed into him causing the injuries for which he

sued. Appellee is the sole witness as to the pertinent facts and from his undisputed testimony it is revealed that his injury was solely attributable to the truck of Billings which backed into him on a graveled passageway adjoining the cars of the appellant railway—which cars he had been inspecting. It is indisputable that had the truck of Billings not been located on the graveled passageway of the appellant appellee would not have been injured. This fact and the jury finding relevant thereto determine the correct adjudication of this appeal.

The case was tried before a jury which returned the following findings of fact:

(1) that the defendant railway company did not furnish Arnold a reasonably safe place in which to do his work which was a proximate cause of his injuries;

(2) the defendant railway company was not negligent on the occasion in question in permitting motor trucks on an area used by the plaintiff Arnold in the performance of his work;

(3) it was not negligence on the part of the railway company to fail to warn Arnold of the approach of the Billings truck;

(4) the railway company did not fail to keep a proper look-out for Arnold;

(5) Billings' truck driver did not fail to keep a proper look-out for Arnold;

(6) it was not negligence for the Billings truck driver to fail to give warning before backing his truck;

(7) it was not negligence for the truck driver to back his truck instead of going forward;

(8) the truck driver did not back his truck too close to the cars where Arnold was working;

(9) the driver did not back his truck too fast; and

(10) it was not negligence for the truck driver to back his truck without clear vision.

Appellant railway company, upon the above findings of the jury, filed its first amended motion for judgment which was overruled. Appellee's motion for judgment was granted and, on the 17th day of December, 1954, under the principle of comparative negligence, judgment was entered awarding a recovery to appellee in the sum of $18,000.00 as against appellant railway company and denying any recovery as against R. A. Billings, the truck owner. Appellant's first point reveals the error of the trial court as complained of in this appeal:

> "The trial court erred in basing judgment on the jury's answers to the general issue finding that defendant failed to 'furnish the Plaintiff Arnold a reasonably safe place in which to do his work' (Issues 1, 2 and 3); whereas, specific findings of the jury on Special Issues 4, 7, 10, 12, 14, 17, 19, 23 and 27, completely negatived such general findings on Issues 1, 2 and 3, and in fact found, in answer to Issues 33 and 34, that the failure of the plaintiff himself to keep a proper lookout, was a proximate cause which could have been nothing but the sole proximate cause of the injuries, if any, sustained by H. T. Arnold."

Of like import are appellant's second and third points of error and a ruling on the above points effects a ruling on all points presented on this appeal.

The testimony of appellee renders indisputable the fact that the sole proximate cause of his injury, insofar as

in the face of the specific findings of the jury exonerating both appellant railway and Billings of any negligence proximately causing appellee's injuries. Walker et al. v. Houston Electric Co., 155 S. W. 2d 973, writ of error refused; Aranda et al. v. Texas & N. O. R. Co., 140 S. W. 2d 236; Sproles et al. v. Rosen et ux., Comm. of Apps., 84 S. W. 2d 1001; El Paso Electric Co. v. Hedrick, Comm. of Apps., 60 S. W. 2d 761; Harbin v. City of Beaumont, supra.

Appellant's points of error are sustained and the judgment of the trial court is reversed and judgment is rendered that appellee take nothing by his suit as against appellant railway company.

HERBERT C. MARTIN, A. M.

APPENDIX B

Judgments and Orders of the Courts Below

No. 6522

In the
COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO

PANHANDLE & SANTA FE RAILWAY COMPANY

v.

H. T. ARNOLD

OPINION BY MR. MARTIN, A. J.

October 10, 1955

This cause came on to be heard on the transcript of the record and the same being inspected and it appearing to the Court that there was error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be reversed and judgment be here and now entered as should have been entered in the court below.

It is accordingly ordered, adjudged and decreed that the appellee, H. T. Arnold, take nothing by reason of his suit against the appellant, Panhandle & Santa Fe Railway Company, and that the appellant go hence without day and recover its costs.

It is further ordered, adjudged and decreed that the appellee, H. T. Arnold, pay all costs in this behalf expended for which let execution issue and this decision be certified below for observance.

THE STATE OF TEXAS }
COUNTY OF POTTER }

I, Elmo Payne, Clerk of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, hereby certify the foregoing to be a true and correct copy of the judgment by this Court, in the above styled and numbered cause, as the same appears of record in the Minutes of this Court.

In testimony whereof, witness my hand and seal of this Court, this the 20th day of June, A. D. 1956.

ELMO PAYNE
Elmo Payne, Clerk

No. 7957/6522

In the
COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO

PANHANDLE & SANTA FE RAILWAY COMPANY

v.

H. T. ARNOLD

November 7, 1955

ORDER OVERRULING MOTION FOR REHEARING

PER CURIAM

This day came on to be heard the motion by the appellee for a rehearing and the same, having been duly considered by the Court, is hereby in all things overruled.

No. A-5577

In the
SUPREME COURT OF TEXAS

H. T. ARNOLD

v.

PANHANDLE & SANTA FE RAILWAY COMPANY

From Lubbock County, Seventh District

March 14, 1956

ORDER REFUSING APPLICATION FOR WRIT OF ERROR

This day came on to be heard the application of petitioner for a writ of error to the Court of Civil Appeals for the Seventh District and the same having been duly considered, and the Court having determined that the application presents no error which requires the reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be refused; that the applicant, H. T. Arnold, pay all costs incurred on this application.

No. A-5577

In the
SUPREME COURT OF TEXAS

H. T. ARNOLD

v.

PANHANDLE & SANTA FE RAILWAY COMPANY

From Lubbock County, Seventh District

April 11, 1956

ORDER OVERRULING MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR

This day came on to be heard the motion for rehearing of application for writ of error, same having heretofore been submitted to the Court, and after due consideration, it is ordered that the said motion be, and is hereby, overruled.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
MAR 22 1957
JOHN T. FEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 240

H. T. ARNOLD,

Petitioner,

v.

PANHANDLE & SANTA FE RAILWAY CO.,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas and the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo

BRIEF FOR THE PETITIONER

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Dallas 1, Texas,
Counsel of Record for Petitioner,

and

J. O. BEAN,
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Dallas, Texas.

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JURISDICTION

The final judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo was rendered and entered on October 10, 1955 (R. 359). The order denying petitioner's Motion for Rehearing by said Court of Civil Appeals was rendered and entered on November 7, 1955 (R. 364).

The order of the Supreme Court of Texas refusing Petitioner's Application for Writ of Error was rendered and entered on March 14, 1956 (R. 392). The order denying Petitioner's Motion for a Rehearing of his Application for Writ of Error by the Texas Supreme Court was rendered and entered on April 1, 1956 (R. 397).

The jurisdiction of this Court rests in *28 U. S. C., Section 1257(3).*

QUESTIONS PRESENTED

Question 1.

Whether the failure of a railway company to furnish its injured employee a reasonably safe place in which to work is a proper jury question upon which a judgment can be entered in an action brought in a State Court under the *Federal Employer's Liability Act, 45 U. S. C., Section 51, et seq.*

Question 2.

Whether a state appellate court in an action brought under the *Federal Employer's Liability Act, 45 U. S. C.,*

Section 51, et seq., may invade the province of the jury and disregard the jury's findings, which are supported by the evidence, that a railway company negligently failed to furnish its injured employee a reasonably safe place to work, proximately causing his injuries, and may consider only the jury's answers to issues which negative negligence of the railway company in some other respects and convict the employee of contributory negligence.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

1.

The constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2.

The statutory provision involved in this case is that portion of the Federal Employer's Liability Act which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person

suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth, shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce, and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908 c. 149, Sec. 1, 35 Stat. 65, Aug. 11, 1939, c., 685, Sec. 1, 53, Stat. 1404. 45 U. S. Code, Sec. 51."

STATEMENT

1. Pleadings.

Petitioner instituted this suit in the District Court of Lubbock County, Texas, 99th Judicial District, under the Federal Employer's Liability Act against the Panhandle & Santa Fe Railway Co. to recover damages for injuries sustained by him in the due course and scope of his employment for the railway company (R. 1).

By way of cross-action Respondent brought R. A. Billings, d/b/a Billings Freight & Baggage Transfer, into the lawsuit as a third party defendant (R. 7-9).

Petitioner went to trial on his first amended original petition (R. 17). In this petition Petitioner alleged that Respondent was guilty of negligence proximately causing Petitioner's injuries (a) in failing to furnish Petitioner a reasonably safe place to work; (b) in failing to warn plaintiff of the truck in the immediate vicinity of where he was working; (c) in failing to maintain a flag man or person to protect Petitioner while performing his duties for the railroad; (d) in failing to furnish and maintain a blue flag for Petitioner; (e) in permitting the truck to be operated in a careless and negligent manner in the vicinity where Petitioner was working; (f) in allowing the truck to be driven on an area normally used as a walkway; and, (g) in failing to keep a proper lookout for Petitioner. Petitioner also alleged that defendant, R. A. Billings, was negligent in certain respects (R. 20-21).

Respondent in its first amended answer (R. 10) and defendant, Billings, in his first amended original answer (R. 12), each denied negligence on their respective parts, and each alleged that Petitioner's own negligence proximately caused his injuries, and Respondent further alleged that Petitioner's own negligence was the sole proximate cause of his injuries (R. 11).

2. Evidence.

(a) *Testimony of Petitioner.*

Petitioner testified that he was a car inspector for Respondent at the time he was injured (R. 26). At the time Petitioner was injured there were three baggage cars on

a spur track which Petitioner was inspecting and on which he was working (R. 29). On the west side of the spur track was a graveled surface which was hard, smooth, and level (R. 29). This graveled surface was ten feet eight inches in width (R. 29). The cars were designated as Nos. 1, 2, and 3 from north to south, and Cars 1 and 2 were connected, but Car 3 was not connected to Car 2 (R. 29).

When Petitioner first came around these three cars he entered the northeast door of Car 1 and saw that mail was being unloaded into Billings' truck from Car No. 1 (R. 30), which truck was backed up at an angle to the west door at the north end of Car No. 1 (R. 31), thereby causing the front of the truck to be headed in a generally northwesterly direction. The truck was filled with mail to the extent that the rear window of the truck was covered (R. 32).

Petitioner then passed on into Car No. 2, and came out of the south door on the west side of Car No. 2 (R. 30). At that time he again saw the Billings' truck backed up to Car No. 1 (R. 30). Then Petitioner walked down to about the center of Car No. 3 and closed a valve and then walked back toward Car No. 2 (R. 32) at which time the truck was still backed up at an angle to the car (R. 33). Petitioner then opened a valve by the door of Car No. 3 which took approximately two seconds (R. 33). He then walked away to the south approximately 27 feet when he was struck in the back by the righthand corner of the end gate of the truck. At the time Petitioner was

hit he was approximately two feet from the side of Car No. 3 (R. 38). The driver of the truck was backing up blind and could not see Petitioner going alongside of Car No. 3 (R. 38), and no warning was given that the truck was backing (R. 39).

The truck which hit Petitioner was eight feet and a few inches wide (R. 36), and Petitioner knew that the truck sometimes went out forward and sometimes went out backwards (R. 37, 64). A driver would have to be pretty good even to stay on the road (R. 71).

On cross-examination Petitioner identified certain of Respondent's exhibits. With the first being a picture of the driveway, the old depot, and some railway cars on the tracks in question (Defendant's Exhibit 1; R. 55, 288 A). Defendant's Exhibit 2 was identified as being a picture of the Billings' truck with the truck being backed up at the approximate angle as it was prior to the time Petitioner was hit by it (Defendant's Exhibit 2; R. 56, 288 A). Defendant's Exhibit 3 was identified as being a truck on the driveway correctly portraying the scene of the accident (Defendant's Exhibit 3; R. 56, 288 B). Defendant's Exhibit 4 was identified as being a picture of the driveway looking to the south on the west side of the tracks (Defendant's Exhibit 4, R. 57, 288B).

Petitioner had told Respondent's agent in charge of the station area, Mr. H. C. Pumphrey, that it was dangerous the way that the trucks backed up in that area, and Mr. Pumphrey agreed with Petitioner that it was dangerous,

but the trucks kept coming up and picking up mail in that manner (R. 42, 286).

(b) *Testimony of Witnesses for Respondent.*

H. C. Pumphrey was the local agent for Respondent. Up to about 1948 and 1949 the graveled area in question had been a narrow walkway when passengers used the area (R. 145). After that the area was widened and graveled to be used by mail trucks in loading and unloading mail from the baggage car that sits on the spur (R. 146).

Mr. Pumphrey further testified that the Billings' truck which hit Petitioner had been instructed by Respondent to use the driveway in question (R. 157); that he had instructed Billings that the trucks were absolutely supposed to come and go from the south (R. 158); that it was not permissible for the Billings' trucks to drive around in front of the station (R. 155); that the driveway was one way and that if the trucks head in that they would have to back out (R. 147, 151).

Mr. Pumphrey further stated that when the truck was backing out there would only be about one and a half feet clearance on each side of the truck (R. 149); that he would not expect a truck and a man to occupy the walkway at the same time (R. 149); that either the man or the truck would have to get off (R. 150); that "it would be dangerous for anybody to step out from behind the truck" (R. 152); but that he did not consider the suitation dangerous (R. 153).

(c) *Testimony of Witnesses for R. A. Billings.*

Mr. Billings himself testified that Respondent had given him specific instructions not to proceed to the north after having entered from the south (R. 235). He was instructed to use this passageway and no other, it having been built by Respondent for his use (R. 243). The driveway was approximately eleven feet wide (R. 235), and if it was a hazard Respondent had made it so (R. 243). The truck which struck Petitioner was ninety-two inches wide (R. 243), and when proceeding down the driveway in question there was a one-foot clearance on each side of the truck (R. 244). As long as a man was even with the side of the truck he would be visible by the side mirrors on the truck, but if he were further towards the left wheel from the side of the truck, he would not be visible (R. 244). A man cannot stand between the edge of the car and the truck without being hit which did not sound very safe (R. 245). If the driveway had been wider it would have possibly been a safer proposition (R. 245). There was not sufficient room to pull the truck forward and turn around before coming out of the driveway (R. 246).

Joe T. Stone was hauling mail in the truck which hit Petitioner as Billings' employee (R. 267). The driveway used by the truck was one way and they were not permitted to go out to the north (R. 268). The driveway was "an awful tight place" (R. 271).

3. Findings of Jury and Judgment of Trial Court.

Based upon the pleadings and the evidence, the trial court submitted by its charge to the jury (R. 308) certain special issues and in answer to those concerning the negligence of the railway company, the jury found that the railway company negligently failed to furnish plaintiff a reasonably safe place in which to do his work, proximately causing his injuries (R. 310). However, the jury found that the railway company was not negligent in permitting the truck to use the passageway (R. 312), in failing to warn plaintiff of the truck as it approached him (R. 311), or in keeping a proper lookout for plaintiff (R. 313). The jury further found that plaintiff failed to keep a proper lookout for his own safety, proximately causing his injuries (R. 319), but not being the sole proximate cause (R. 320). The jury further exonerated Defendant Billings of negligence (R. 313-319). The jury then assessed Petitioner's damages at $30,000.00, which sum was reduced on a comparative negligence basis to the sum of $18,000.00 (R. 321).

Under the pleadings, evidence and verdict of the jury, the trial court rendered judgment for Petitioner against Respondent for the sum of $18,000.00, with interest thereon at the rate of 6% per annum until paid and further ordered that the Railroad Retirement Board of the United States first have and recover from Respondent out of the $18,000.00 damages awarded its lien and subrogation in the amount of $1,302.00. The trial court further ordered

that neither Petitioner nor Respondent should recover anything from defendant, R. A. Billings (R. 326).

4. Action Taken by State Appellate Courts.

From the judgment of the trial court awarding Petitioner damages from Respondent, Respondent duly perfected its appeal to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo. In reversing the trial court judgment for Petitioner and rendering judgment for Respondent (R. 359), the Court of Civil Appeals held in part as follows:

> "The testimony of Appellee renders indisputable the fact that the sole proximate cause of his injury, insofar as might be chargeable to Appellant, and not to Appellee's own contributory negligence, was the truck of Billings located on the graveled passageway. Since the jury found, under Special Issues Nos. 7 and 8 outlined under No. 2 hereinabove, that the Appellant railway company was not negligent on the occasion in question in permitting motor trucks on an area used by Plaintiff Arnold in the performance of his work, Appellant was entitled to judgment in the trial court on such verdict. If Appellee was not furnished a safe place to work by Appellant, it was solely by reason of the fact that the truck of Billings was permitted in the area. If the railroad was not negligent in permitting the motor truck in the area, then it necessarily follows that it did not fail to furnish Appellee a reasonably safe place in which to do his work. In any event, under the jury findings, no negligence could attach to Appellant by reason of the truck being in the area, and the alleged consequent failure of Appellant to furnish Appellee a safe place to work. Without negligence on the part of Appellant, it could not be liable to Appellee. Benson v. Mo. K. & T. R.

Co., 200 S. W. 2d 233, Writ Ref.; International-Great Northern R. Co. v. Lowry, 121 S. W. 2d 585 (Sup. Ct., Texas). Further strengthening this proposition are other jury issues in the cause. The jury found that a proximate cause of Appellee's injury was his own failure to keep a proper lookout. In the total absence of negligence and causation attributable to either the Appellant railway company or to Billings' truck driver, Appellee's failure to keep a proper lookout necessarily becomes the sole proximate cause of his injuries, and he cannot recover as against the Appellant railway.

"* * * The ruling in the case (Harbin, et al. v. City of Beaumont, 146 S. W. 2d 297) wholly sustains the opinion hereinabove on the sound principle that where a jury has acquitted Appellant of all specific acts of negligence, a finding of the jury that the Appellant was guilty of negligence in not furnishing Appellee a reasonably safe place in which to work is nothing more than the jury's conclusion of law which has no support in the facts found, and, therefore, cannot support a judgment. * * *

"* * * A general finding that Appellant failed to furnish Appellee with a safe place to work cannot stand in the face of the specific findings of the jury exonerating both Appellant railway and Billings of any negligence proximately causing Appellee's injuries. * * *." (R. 357-358.)

Petitioner duly filed his Motion for Rehearing with the Court of Civil Appeals (R. 360), which motion was overruled (R. 364). Following this Petitioner filed his Application for Writ of Error with the Supreme Court of Texas (R. 365), which Application was refused by the Supreme Court of Texas (R. 392). Petitioner then filed his Motion for Rehearing of the Application for Writ of

Error (R. 393), which Motion was overruled by the Supreme Court of Texas (R. 397).

SUMMARY OF ARGUMENT

Petitioner instituted this suit under the Federal Employer's Liability Act to recover for injuries suffered by him while in the course and scope of his employment for Respondent. The questions presented in this case are simple ones and similiar questions have consistently been resolved by this Honorable Court in favor of similarly situated Petitioners.

With reference to Respondent's duty to furnish Petitioner a reasonably safe place to work, the evidence showed that Petitioner was struck by a truck which was backing up (R. 34) on a ten foot eight inch gravel driveway running adjacent to Respondent's railroad tracks on which were situated three railway cars (R. 29). The driver was backing blind and could not see Petitioner going alongside the last of the cars (R. 38), and the driver of the truck was forced to back out under specific instructions from one of Respondent's agents (R. 147). It was Petitioner's duty to inspect these cars (R. 29). There was evidence to the effect that Respondent had knowledge of the dangerous condition existing by reason of the narrowness of the driveway and the backing of the trucks (R. 42, 286), although this knowledge was denied by one of Respondent's employees (R. 153).

Based upon this and other evidence set forth above in the Statement, the jury found in response to special issues

submitted to them that Respondent failed to furnish Petitioner a reasonably safe place to work, which was negligence, proximately causing Petitioner's injuries (R. 310).

In addition, the jury found that Respondent was not negligent in failing to warn Petitioner of the approach of the truck (R. 311), in permitting the truck to be driven on the area (R. 312), nor in failing to keep a proper lookout for Petitioner (R. 313).

In addition, the jury found that Petitioner failed to keep a proper lookout, proximately causing his injuries.

The trial court in its judgment found that the jurys' answers to these issues established liability on the part of Respondent.

The Amarillo Court of Civil Appeals reversed the judgment of the trial court and rendered judgment for Respondent holding that the jury's finding that Respondent failed to furnish Petitioner a reasonably safe place to work was a conclusion of law without factual support, and further that such finding was destroyed by the other issues negativing negligence on the part of Respondent. The Amarillo Court therefore concluded that there was no basis in the facts found to support a judgment (R. 358). The Amarillo Court further found that as a matter of law Petitioner's contributory negligence was the sole proximate cause of his injuries (R. 358).

These holdings by the Amarillo Court were clearly in violation of the humanitarian and liberal intent of Con-

gress as evidenced by the Federal Employer's Liability Act. This intent of Congress has been successfully protected on many occasions by this Honorable Court.

It has often been held in this connection that one of the primary issues in a case brought under the Act is whether or not the employer furnished the employee with a reasonably safe place to work. That the safe place to work issue is an ultimate issue and one upon which judgment can be entered, is a proposition that is well supported by the opinions of the United States Supreme Court. *Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 Sup. Ct. 1062.*

The Act itself imposes liability upon the employer for injuries suffered by an employee resulting "in whole or in part" from a "defect or insufficiency," due to the employer's negligence, in the places or equipment furnished the employee to work which is just another way of saying that the employer will be liable if he fails to furnish the employee a safe place to work.

Thus, since the unsafe place to work issue is an ultimate issue which was clearly supported by the evidence, the trial court properly entered judgment for Petitioner. *Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 Sup. Ct. 444.*

Therefore, when the Amarillo Court found that the jury's finding that Respondent failed to furnish Petitioner a reasonably safe place to work would not support a judgment, that Court was invading the province of the jury, thereby depriving Petitioner of his right to trial by jury

submitted to the jury for their determination in determining the liability of the employer. In the instant case the Amarillo Court of Civil Appeals held that "a finding of the jury that the Appellant was guilty of negligence in not furnishing Appellee a reasonably safe place in which to work is nothing more than the jury's conclusion of law which has no support in the facts found, and therefore, cannot support a judgment" (R. 358). This holding that a jury finding that employer failed to furnish its employee with a safe place to work is only the jury's conclusion of law certainly does not conform with the cases decided under the Federal Employer's Liability Act, and is not in accord with the holdings of this Honorable Court.

This can be readily seen by an examination of this Court's opinion in *Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 Sup. Ct. 1062.* On Pages 352 and 353 of its opinion the Court held as follows:

> "Section 1 of the Act makes the carrier liable for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' * * * The rights which the Act creates are Federal rights protected by Federal law rather than local rules of law. * * * And those Federal rules have been largely fashioned from the common law except as Congress has written into the Act different standards. * * * At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. * * * That rule is deeply engrained in Federal jurisprudence. * * * It is that rule which obtains under the Employer's Liability Act."

Further discussing the "unsafe place to work" issue this Honorable Court stated in its opinion in the *Bailey* case that:

> "The debatable quality of that issue, the fact that fair men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury."

Another example of the safety of the place furnished an injured employee in which to do his work as being determinative of the liability of his employer is exhibited by the case of *Lavender v. Kurn, 327 U. S. 645, 66 Sup. Ct. 740*, in which the United States Supreme Court rendered judgment for the injured employee where the conditions were such that it was not unreasonable to conclude that an unsafe and dangerous working place existed and that the conditions contributed, in part, to the switch tender's death.

In the case of *Griswold v. Gardener, 155 Fed. 2d 333 (146)*, the Court of Appeals for the Seventh Circuit held that what constitutes a reasonable safe place to work, negligence and proximate cause are jury questions under the Federal Employer's Liability Act. Certiorari was denied in this case at *329 U. S. 725, 67 Sup. Ct. 74.*

Even in cases arising and being tried in some of the State Courts in Texas the issue of whether or not the employer furnished the employee with a reasonably safe place to work has been considered to be an ultimate issue upon which judgment has been entered. However, it is so well established that this is an ultimate issue that the submission of it to the jury has not been questioned. A

case in which such an issue was made a basis for judgment in Texas, but was not in issue on appeal, is *T. & P. Ry. Co. v. Riley*, in which certiorari was denied, *325 U. S. 873, 65 Sup. Ct. 1414 (Texas case 183 S. W. 2d 991).*

The Federal Employer's Liability Act itself states that every railroad employer shall be liable in damages for injury resulting in whole or in part "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment." This is certainly tantamount to saying that such railroad employer would be liable in damages for injury resulting from its failing to furnish its employees with a safe place to work, and this has been the interpretation of this Court and many lower courts, both Federal and State. In the instant case, the place furnished by Respondent to Petitioner for Petitioner's work was Respondent's roadbed and its tracks and cars. Certainly asking the jury whether or not Respondent failed to furnish Petitioner a reasonably safe place to work is the same thing as asking the jury to determine whether or not there was a defect or insufficiency in the cars, track, or roadbed upon which Petitioner, by the very nature of his work for Respondent, was required to work. Therefore, it is without question that the Act itself makes the issue of whether or not a reasonably safe place to work was furnished an injured employee an ultimate fact issue to be determined by the jury and submission of issues in substantially the words of a statute has always been approved by the courts.

For the purposes of argument only, Petitioner might concede that the Amarillo Court of Civil Appeals would have correctly held the issue regarding safe place to work as being a conclusion had the case been an ordinary damage suit tried under the laws of the State of Texas. However, this was not the case, and yet, the Amarillo Court in its unrelenting obedience to the peculiar local special issue practice prevalent in Texas felt compelled to apply the meticulous rules prevalent in such special issue practice to conclude that the issue concerning the safety of the place furnished Petitioner in which to do his work was not an ultimate fact issue in the case. This is precisely the practice which has on many occasions been condemned by this Honorable Court. In regard to such practices, Mr. Justice Holmes stated in the case of *Davis v. Wechsler, 263 U. S. 22, 24, 44 Sup. Ct. 13, 14*, that:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

This principle was also stated as hereinbefore quoted in *Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 352.*

The principle has also been recognized by Texas Appellate Courts. For example, in the case of *T. & P. Ry. Co. v. Younger, 262 S. W. 2d 557, 560, Ft. Worth (Error Ref., N. R. E.)*, which was instituted under the Federal Employer's Liability Act, it was held that under the Act "no substantive right of any party may be impaired by any local statute, rule of practice, or forms of local practice."

Petitioner, by selecting a State tribunal, did not by that act amend or modify his substantive rights under the Federal Act. Had he selected a Federal tribunal, a charge on unsafe place would certainly have been proper as has been held on many occasions. There is no question but that what constitutes a proper issue in a Federal Employer's Liability Act case is not a matter of procedure but a matter of substantive rights to be liberally construed, not varying in the Courts with different conceptions under State laws and rules. Since Federal substantive rights must be uniformly applied in State and Federal Courts alike and cannot be defeated by the forms of local practice, uniform interpretation of the Federal Employer's Liability Act and substantive rights thereunder dictate that Petitioner was entitled to have his case submitted to the jury on the ultimate issue of the safety of the place furnished by his employer in which to do his work. Therefore, the finding of the jury in the instant case that Respondent failed to furnish a reasonably safe place in which to work was not merely a conclusion, but was an ultimate fact issue properly submitted to the jury and upon which a judgment could be entered.

POINT TWO

The evidence was more than sufficient to support the jury's finding that Respondent failed to furnish Petitioner a reasonably safe place to work.

The Amarillo Court of Civil Appeals held that the "finding of the jury that the Appellant was guilty of negligence

in not furnishing Appellee a reasonably safe place in which to work is nothing more than the jury's conclusion of law which has no support in the facts found" (R. 358). Petitioner assumes that the Court meant that this finding was not supported by the jury's further findings that Respondent was not negligent in failing to warn Petitioner of the approach of the truck (R. 311); that Respondent was not negligent in permitting motor trucks to be driven on the area used by Petitioner (R. 312); and that Respondent did not fail to keep a proper lookout for Petitioner. As will be hereinafter more fully discussed and pointed out under Point Three, these latter three sets of issues have no connection with the issue concerning unsafe place, and certainly have little if any bearing on the jury's answer to the issue concerning safe place and the evidence in support of such finding.

If Petitioner has correctly interpreted the Amarillo Court's reasoning on this matter, then Petitioner sees little justification for such statement having been made in the opinion. Petitioner was not seeking support of his contention that Respondent failed to furnish him a safe place to work on the facts found in response to the other issues which were found favorable to Respondent in connection with negligence of itself and its employees.

However, if the Court meant to say that the jury's finding that Respondent failed to furnish Petitioner a safe place to work was not supported by the facts, meaning the evidence, then certainly the Amarillo Court was in

error. Petitioner was not seeking support to that issue from facts found in response to other issues, for the safe place issue was separate and distinct from such other issues and was based on other evidence.

The evidence in support of the jury's finding that Respondent failed to furnish Petitioner a safe place to work is fully set forth in the Statement herein. For the sake of brevity, Petitioner will not again set forth all the evidence in support of the jury's finding on the safe place issue, but Petitioner does respectfully again point out certain salient points of evidence in this regard.

Petitioner was struck by a truck owned by one Billings (R. 34) on a ten foot eight inch graveled passageway which was smooth and level (R. 29) and was constructed by the railway company (R. 146). The truck was between ninety-two inches (R. 243) and something more than eight feet wide (R. 36). Trains or cars were placed on the track adjoining the passageway by Respondent for inspection by Petitioner (R. 29), at the same time the Billings' truck was unloading mail from the mail car on the train (R. 30). Respondent directed the truck to use the passageway which was one way (R. 146), had clearance on each side of the truck of only one to one and a half feet (R. 149, 244) and had no room in which to turn around (R. 246). The truck when picking up the mail was not permitted to go out forward around in front of the station after picking up the mail, but if it drove in forward as it did, it had to back out as it did (R. 147, 158). The passageway was too

narrow to be occupied by the mail truck and Petitioner at the same time (R. 150). That all was under the railway company's direction, control, and on its premises (R. 146, 147). The railway company had knowledge of the dangerous condition created by virtue of such combination of circumstances (R. 42, 286), although this knowledge was denied by Mr. Pumphrey (R. 153). Mr. Billings also testified that there was not room for a man to stand between the edge of one of the railway cars and his truck; that this condition sounded not very safe; and that a wider driveway would have possibly made it safer (R. 245). Billings' driver, Joe Stone, described the situation presented as being "awful tight place" (R. 271).

Without unduly burdening this Honorable Court with lengthy argument, it appears obvious that the testimony above referred to, coupled with that additional testimony set forth in the statement herein clearly shows that the jury had ample support in the evidence in its finding that Respondent failed to furnish Petitioner with a reasonably safe place to work. This is true without having to take advantage of the apparent holdings that the jury's power to draw inferences in this type of action is greater than in common law actions. *Jesionowski v. B. & M. R. Co., 329 U. S. 452, 67 Sup. Ct. 401; Lillie v. Thompson, 332 U. S. 459, 68 Sup. Ct. 140; Affolder v. N. Y. C. & St. L. R. Co., 339 U. S. 96, 70 Sup. Ct. 509; Smalls v. Atlantic Coast Line R. Co., 348 U. S. 946, 75 Sup. Ct. 439; Ruddy v. N. Y. Central R. Co., 224 Fed. 2d 96.*

When fair-minded men can draw different conclusions from the evidence, the case is not one of law but one of fact to be settled by the jury. *Myers v. Reading Co., 331 U. S. 477, 67 Sup. Ct. 1334.* It is the intent of the Congress that to the maximum extent proper, questions in actions arising under the Federal Employer's Liability Act should be left to the jury. *Tiller v. Atl. Coast Line R. Co., 318 U. S. 54, 63 Sup. Ct. 444.* Such cases may not be taken from the jury merely because the question of liability is close or doubtful, *Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 Sup. Ct. 1062.*

> "It is not the function of the Court to search the record for conflicting circumstantial evidence in order to take the case away from a jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29.*

In any case in which fair-minded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute, by choosing what seems to them to be the most reasonable inference. It is not material that an Appellate Court may draw a contrary inference or feel that another conclusion is more reasonable. *Lavender v. Kurn, 327 U. S. 645, 66 Sup. Ct. 740.*

In view of the evidence presented and the law in point it appears that without question that the jury's finding that Respondent failed to furnish Petitioner a safe place to work is supported by the evidence without reference to

other facts found by the jury in answer to other issues submitted to them.

POINT THREE

Holding that the jury's finding that Respondent failed to furnish Petitioner a reasonably safe place to work would not support a judgment for Petitioner deprives Petitioner of his constitutional right to trial by jury.

As hereinbefore demonstrated, the trial court properly submitted to the jury an issue inquiring as to whether Respondent failed to furnish Petitioner a reasonably safe place in which to work since such issue is unquestionably a proper ultimate issue in a case tried under the Federal Employer's Liability Act. It has also been shown that the jury's finding that Respondent failed to furnish Petitioner a reasonably safe place to work was more than supported by the evidence.

Therefore, *the holdings of the Amarillo Court of Civil Appeals* being (a) that the jury's findings that Respondent failed to furnish Petitioner a reasonably safe place in which to do his work constituted a conclusion of law having no factual support and was destroyed by the findings acquitting Respondent of specific acts of negligence (R. 358), and (b) that the Plaintiff's failure to keep a proper lookout for his own safety constituted the sole proximate cause of his injuries (R. 358), where the jury had found that such failure was not the sole proximate cause (R. 336), *clearly constitute invasions of the jury's province*

and deprive Petitioner of his constitutional right of trial by jury.

When an injured railway employee has been deprived of his constitutional right of trial by jury, this Honorable Court has on many occasions jealously restored this right. *Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 Sup. Ct. 444; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29; Lavender v. Kurn, 327 U. S. 645, 66 Sup. Ct. 740; Schulz v. Pennsylvania R. Co., 350 U. S. 523, 76 Sup. Ct. 608,* to mention but a few.

The court in *Bailey v. Central Vermont R. Co., 319 U. S. 350, 63 Sup. Ct. 1062,* at Page 353 of its opinion stated this fundamental principle as follows:

> "The right to trial by jury is a basic and fundamental feature of our system of Federal jurisprudence. It is part and parcel of the remedy afforded railroad workers under the Employer's Liability Act. Reasonable care in cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The holding of the Court of Civil Appeals that as a matter of law the failure of Petitioner to keep a proper lookout for his own safety constituted the sole proximate cause of his injuries (R. 358) was made directly in the face of the evidence which Petitioner respectfully contends conclusively showed that his injuries were *proximately caused*

by the failure of Respondent to furnish Petitioner a reasonably safe place to work, and the jury so found. Therefore, failing to keep a proper lookout for his own safety could not constitute the sole proximate cause of plaintiff's injuries since there cannot be a sole proximate cause finding where another finding of proximate cause exists.

The Federal Employer's Liability Act requires only that the jury find that the injuries were caused "in part," by the employer. The jury went even further and found that Petitioner's injuries were *proximately* caused by Respondent's negligence. Therefore, the Court was not justified in disregarding the jurys' finding.

The elements found by the jury in favor of Respondent that it was not negligent in permitting the truck to use the passageway (R. 328) nor in failing to warn Petitioner of the approach of the truck (R. 327), and that Respondent did not fail to keep a proper lookout for Petitioner certainly do not destroy findings of unsafe place as they were held to do by the Amarillo Court of Civil Appeals (R. 358). In the first place, the issues found in Respondent's favor were those submitted to a jury on the basis set forth in the Federal Employer's Liability Act that the employer shall be liable for the negligence of any of its officers, agents or employees. The issue regarding the safety of the place furnished Petitioner in which to do his work concerned that portion of the Act creating liability on the part of the employer where such injury resulted in whole or in part by reason of a defect or insufficiency in

Respondent's places of work or equipment. Thus, there are two separate and distinct bases of recovery set forth in the Act, and each of these bases was submitted to the jury in these respective issues, and the finding against Petitioner on the negligence of Respondent's officers, agents and employees does not destroy the safe place finding in favor of Petitioner based upon "defect or insufficiency."

Another strong reason that the issues of liability found in Respondent's favor do not destroy the safe place finding against Respondent is that the findings in Respondent's favor were based on only three evidentiary elements, whereas, there were many other evidentiary elements and an abundance of evidence in support thereof to the effect that the railway company had created a dangerously narrow passage way resulting in an unsafe place to work. The evidence in support of this unsafe place has been fully discussed in the Statement herein and in the foregoing Point, and for this reason, Petitioner will not repeat this testimony at this point. However, taken as a whole (as in *Blair v. B. & O. Ry. 323 U. S. 600, 65 Sup. Ct. 1528)* where the several elements are so closely interwoven as to form a single pattern and where one element imparts character to the other, clearly the jury had a right and obviously did take into consideration the overall scope of construction, maintenance, control and instructed use by the railway of its premises, the nature of the tasks in-

volved, the hazards entailed, such as footing, clearance or lack of space on the one-way passageway, in determining that the railway company had failed to furnish Petitioner a reasonably safe place in which to perform his work.

As a matter of logic, the jury's findings that Petitioner was not negligent in certain respects did not conflict with their finding that Respondent failed to furnish Petitioner a reasonably safe place to work. Unquestionably, the jury gave this matter its very considered and careful thought and attention in determining that a preponderance of the evidence showed that Respondent did fail to furnish Petitioner a safe place to work, but that it did not show that Respondent was negligent in the other respects. To now say that the jury's favorable finding on safe place was destroyed by the unfavorable findings on specific negligence is to completely abrogate Petitioner's right of trial by jury.

As stated by the Court in *Urie v. Thompson, 337 U. S. 163, 69 Sup. Ct. 1018*, on Page 174 of the opinion "what constitutes negligence for the Statutes' purposes is a Federal question, not varying in accordance with the differing conceptions of negligence applicable under State and local laws for other purposes. Federal decisional law formulating and applying the concept governs."

Also applicable to the opinion of the Court of Civil Appeals is that portion of the opinion of the Supreme Court

of the United States of *Tennant v. Peoria P. & U. Ry. Co., 321 U. S. 29, 35,* as follows:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instruction, and draws the ultimate conclusion as to the fact. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because Judges feel that other results are more reasonable."

Petitioner again states that this is a prime example where in "Federal Employer's Liability Act cases that an indifferent or unfriendly attitude had permeated with a philosophy hostile to that reflected in the legislation" (Mr. Justice Douglas, *Stare Decisis, 49 Col. L. Rev., 735, 752).* In giving vent to this attitude the Amarillo Court of Civil Appeals improperly invaded the province of the jury by substitution of its own conclusions for that of the jury thereby denying Petitioner his constitutional right of trial by jury.

CONCLUSION

Petitioner respectfully submits that the judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo be reversed and the judgment of the trial court affirmed.

Respectfully submitted,

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and

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No. 240

In The

Supreme Court Of The United States

OCTOBER TERM

H. T. ARNOLD,

Petitioner,

v.

PANHANDLE & SANTA FE RAILWAY CO.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

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PANHANDLE & SANTA FE RAILWAY CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Respondent, Panhandle and Santa Fe Railway Company, having received on July 7, 1956, copy of printed document entitled PETITION FOR CERTIORARI, in deference to the literal wording of Supreme Court Rule 24 — "respondent shall have thirty days . . . . after receipt of a petition, within which to file . . . . an opposing brief" — proceeds, within thirty days after July 7, 1956, to file this, its Brief In Opposition, making herein the best record references it can.

OPINIONS AND ORDERS BELOW

The Opinions and Orders of the Court below are correctly set forth in the Petition except as to two insignificant typographical errors: 1) page 25, "last", second word in last paragraph, should obviously be "law"; 2) page 26, "A.M.", should obviously be "A.J."

JURISDICTION

On its face the Petition does not disclose jurisdiction in this Court: 1) It confesses, page 9, that the questions Petitioner seeks to present were first presented in the Court of Civil Appeals in "his Motion for Rehearing"; 2) Since the case arose in the State Court, the Petition does not effectually comply with Supreme Court Rule 23 — 1 (b) (iii), or 23 — 1 (f).

QUESTIONS PRESENTED

1. Whether jurisdiction is disclosed by the Petition.
2. Whether a Texas State Court may construe a jury verdict in a Federal Employer Liability Act Case, consistent with the construction placed on all verdicts, by the Texas, Federal, and other State courts.
3. Whether any Federal question has been decided by the Court of Civil Appeals, or, if so, if the opinion and judgment do not adequately rest on non-Federal grounds.
4. If any Federal right or immunity has been affected, whether the case involves such "general principles", or is of such "public interest" as to warrant review.
5. Whether the opinion and judgment of the Court, or Courts, below are clearly right.

STATUTE INVOLVED

The suit against Respondent is brought under 45 U. S. C. A., Sec. 51, et seq.

STATEMENT OF THE CASE

Petitioner, as plaintiff, sued Billings Transfer Company, and Respondent, his employer, compaining that one of Billings' trucks ran over him. He charged Billings was negligent in eleven particulars. He alleged that Respondent was negligent A) in failing to furnish safe place to work; B) in failing to warn him of the presence of the truck; C) In failing to provide a flagman to protect him; D) In failing to furnish him a blue flag; E) In permitting the truck to be operated in a careless manner; F) In permitting the truck to be in the area; G) In failing to keep a proper lookout for him. (Tr. 24-30).

From these allegations and plaintiff's testimony 1) that he knew of the presence of the truck (S.F. 10); 2) that the surface on which he was injured was a "pressed gravel walk-way", "hard", "smooth", "level" (S. F. 7); and 3) that Billings' truck backed against him without giving signal (S.F. 15, 25), it is obviously plaintiff's claim that the place was "unsafe" because of the use being made thereof, and the acts and omissions which he particularized.

The trial court submitted every issue requested by plaintiff, covering all specific acts and omissions particularized, and some not alleged: Compare the charge (Tr. 55-71) with plaintiff's Amended Petition (Tr. 24-30). At plaintiff's request, and over defendant's objection that Special Issues 1, 2 and 3 were merely general issues, and that "a reasonable safe place to work" had not been defined (Tr.

42-43, Objections 4, 5 and 6) the Court also submitted therein the general issue of "unsafe place" (Tr. 75-76—Issues 1, 2 and 3). The jury absolved defendant and Billings of responsibility for every act or omission particularized in the pleading and in the issues (Tr. 75-84, — Issues 4-29A), including specific findings that defendant was not negligent in failing to warn plaintiff (Issues 4-6A); that defendant was not negligent in permitting the truck to use the area (Issues 7-9A); that defendant did not fail to keep a proper lookout for plaintiff (Issues 10-11A); that Billings' driver did not fail to keep a proper lookout for plaintiff (Issues 12-13A); that the truckdriver's failure to give warning was not negligence (Issues 14-16A); that it was not negligence to back said truck (Issues 17-18A); that the truck did not back "too close to the . . . cars on which plaintiff was working" (Issues 19-21A); that the truck did not back at negligent speed (Issues 23-25); that operating the truck without clear vision was not negligence (Issues 27-29A). In conflict with these specific findings, and without the term having been defined, the jury then made the general finding of failure to furnish safe place to work, negligence, and causation (Issues 1-3). The jury then found that plaintiff's negligence in failing to keep a proper lookout for the truck was a proximate cause of his injuries, but not the sole cause (Issues 33-34A), and diminished the damages therefor (Issue 39).

The Court of Civil Appeals, giving express recognition to the fact that the case was tried, and must be decided, in keeping with Federal decisions, has merely construed the jury's verdict, and held that the jury's specific findings above set forth, completely negatived and destroyed its general finding of unsafe place, with the legal con-

sequence that plaintiff's specifically found negligence in failing to keep a proper lookout, was the only validly found cause of his injury.

REASONS FOR DENYING THE WRIT

A. THE COURT OF CIVIL APPEALS HAS MERELY CONSTRUED THE VERDICT.

"The pleadings establish the boundary of a lawsuit", Socony Vacuum Oil Co. v. Aderhold, 150 Texas, 292, 240 S. W. (2) 751.

Giving full recognition to Federal rights, and the holdings of Federal decisions, Texas Courts, in all cases, follow "our settled rules of procedure". Hopson v. Gulf Oil Corp., 150 Texas, 1, 237 S. W. (2) 352; Socony Vacuum Oil Co. v. Aderhold, *supra.*

"The issue in response to which the general finding was made should not have been submitted", Sproles v. Rosen, 126 Tex. 51, 84 S. W. (2) 1001; "On appellant's petition, having plead special facts invoking appellee's duty to guard the hole, the additional allegation that appellee was guilty of negligence in failing to furnish Harbin a reasonably safe place to work was a mere legal conclusion, flowing from the specific facts, and not a plea of a special act of negligence. Having acquitted appellee of all specials acts of negligence, the finding of the jury that appellee was guilty of negligence in not furnishing Harbin a reasonably safe place to work was nothing more than the jury's conclusion of law, which has no support in the facts found, and therefore cannot support a judgment." Harbin v. City of Beaumont, Tex. Civ. App., 146 S. W. (2) 297, writ of error dismissed – judgment correct.

It is the very essence of the judicial review function to construe a jury verdict, and when a general jury finding is completely negatived by specific findings, the general finding must be disregarded, and the specific findings control. Federal Rules of Civil Procedure, Rule 49; Pardee v. Aldridge, 189 U. S., 429, 23 S. Ct. 514, 47 L. ed. 883; Golden North Airways v. Tanana Publishing Co., 218 F. (2) 612; Lasagna v. McCarthy, 177 Pac. (2) 734, (certiorari denied) 332 U. S. 829, 68 S. Ct. 205, 92 L. ed. 403; Benson v. Missouri-Kansas-Texas R. Co., Tex. Civ. App., 200 S. W. (2) 233 (certiorari denied), 332 U. S. 830, 68 S. Ct. 206, 92 L. ed. 403; Walker v. Houston Electric Co., Tex. Civ. App., 155 S. W. (2) 973, Writ of Error Refused; Sproles v. Rosen, *supra;* Harbin v. City of Beaumont, *supra;* Peeler v. Smith, Tex. Civ. App., 18 S. W. (2) 938, aff., 29 S. W. (2) 975.

The questions posed by Petitioner are ineptly stated, and are not the real questions involved. The question is not "whether a reasonably safe place in which to work is a proper jury question upon which judgment can be entered". If no objection is made to its generality, of course it is. But when objected to as being general, as it here was, it is not. But, the real question at issue is, can plaintiff submit his case in one general, all-inclusive issue and then submit the same concept in specific issues which make up the whole of the general issue? And, having done so, and the jury having found the place to be safe in all particulars, but without proper guidance from the Court have further found generally that the place is unsafe, will the general finding support the judgment? Cases already cited, and numerous others, answer these questions in the negative.

Petitioner's Statement contends that the area was too narrow for the truck and Petitioner. But, upon full evidence, the jury foreclosed this issue against Petitioner when it found that defendant was not negligent in letting the truck use the area (Issue 8), and that the truck was not backed "too close the railway cars on which plaintiff . . . was working" (Issue 19).

Petitioner says, page 6, that the truck was not permitted to go forward; that "it had to back out as it did." This is directly contrary to Petitioner's testimony. He stated repeatedly it had gone forward "lots of times" (S. F. 19-20, 61, 78).

Petitioner misconstrues the holding of the Court of Civil Appeals. On pages 12 and 17 he argues that the Court has held that the finding of unsafe place has "no support in the evidence". What the Court said is that the finding of unsafe place could not be a basis of liability "under the jury finding"; that the general finding "has no support in the facts found". (Petition, pages 24-25.)

Petitioner argues, in effect, that plaintiff has been subjected to a law ruling of "no evidence", and he cites a multitude of cases holding that the lower courts had erred in denying plaintiff a jury trial, which he says are "in direct conflict" with the Court's holding. Those cases are not in point here. The Court of Civil Appeals made no such holding. Plaintiff had a jury trial. The jury returned a verdict. The Court of Civil Appeals has construed that verdict, and has held that its legal effect is a verdict for Respondent, and not for Petitioner.

B. THE OPINION AND JUDGMENT OF THE COURT OF CIVIL APPEALS RESTS UPON NON-FEDERAL GROUNDS.

The judicial construction of a jury verdict, the same as the construction of contracts, is not a Federal question. It is not a decision on Federal law. It is a decision of local or general law of the forum, made in keeping with the procedure and precedent rulings of the forum. See cases cited under heading A hereof.

C. THE CASE IS NOT OF SUCH IMPORTANCE AS TO JUSTIFY REVIEW.

This case is of importance to the parties only. It was tried as arising under the Federal Employers Liability Act. The trial was to jury. Every issue tendered by plaintiff was submitted, some not even embraced in his petition. That the situation of which Petitioner complains is rare, and of infrequent occurence, is evidenced by the fact that Petitioner cites not a single case construing a jury verdict. The matter of which Petitioner complains is of Petitioner's own making in the intransigeance of his trial counsel. He induced the trial Court to submit a wholly improper issue, without defining a legal term employed therein, over Respondent's objection that the issue was improper, and that the term had not been defined, when the uniform line of decisions cited under Heading A hereof condemned the course pursued. There is no reason to suppose that the situation will arise again, when it can be so readily avoided by conforming to decisional precedent, rather than insisting upon a double submission of plaintiff's case, as was here done. In such matters as are found here, arising in the manner here shown, there is no public interest; there

is nothing of national importance; no statutory construction is involved. The case does not merit review by this Court — The Supreme Court of Texas would not review it.

D. THE OPINION, AND ORDERS OF THE COURTS BELOW ARE RIGHT.

This proposition is established by 1) the Texas Supreme Court's failure to find reversible error (Petition, page 30), and 2) the authorities cited under Heading A hereof. Respondent will review only two of said cases which are so closely in point to this case.

In Lasagna v. McCarthy, Utah Sup. 177 Pac. (2) 734, (certiorari denied), 332 U. S. 829, 68 S. Ct. 205, 92 L. ed. 403, plaintiff, a car inspector, recovered a judgment for personal injuries. On appeal he claimed defendant violated its duty to him in 1) failure to furnish a safe place to work; 2) failure to furnish a blue flag; 3) failure to furnish a switch lock; and 4) failure to enforce safety rules. In reversing, and rendering judgment for defendant, the Court first held that there was no "physical condition" in the yard that made it unsafe. Then, proceeding to answer plaintiff's contention that the yard was unsafe because of the unsafe practices specified in 2), 3) and 4) above, the Court said: "This being so, the four grounds merge into one. That is, because safety rules were not enforced or safety appliances furnished respondent, the place was thereby rendered unsafe." As shown, this Court refused to review on the merits. The situation involved there, is identical to that here involved.

In Benson v. Missouri-Kansas-Texas R. Co., Tex. Civ. App., 200 S. W. (2) 233 (writ of error refused), (Certiorari denied), 332 U. S., 830, 68 S. Ct. 206, 92 L. ed. 403, the

trial Court construed the jury's verdict, gave judgment for defendant, and the Court of Civil Appeals affirmed. The jury found that defendant was negligent "in the manner of laying and maintaining its main line and passing track"; that such negligence was not "the direct and proximate cause of the death"; and (after finding total damages of $37,030), found that the "negligence on the part of the defendant, proximately contributed to cause the death" to the extent of "60%", but it also found that Benson's negligence was a proximate cause of his death. How strikingly similar the jury findings there to the jury findings here! The Court of Civil Appeals laboriously construed the verdict as a whole, and while agreeing with plaintiff's contention that ordinarily a finding of "direct and proximate cause" was synonymous with "sole proximate cause", considering the charge and verdict as a whole, since "sole proximate cause" had been separately submitted, held that the jury's finding that defendant's negligence was not "the direct and proximate cause of death", in legal effect and meaning was only a finding that said negligence was "not a proximate cause of death"; that the general finding that defendant's negligence contributed "60%" to death was only a general finding, to be disregarded; that the finding that deceased's negligence proximately caused his death, was, in legal effect, *the sole proximate, and only legal cause* of his death. As previously indicated, this Court refused to review on the merits. How strikingly, strikingly, similar that case to this case! While correct, how much more involved and difficult the construction of jury verdict made in that case, than the construction of jury verdict made in this case!

E. JURISDICTION IS NOT DISCLOSED.

As previously stated, Respondent does not believe the Petition discloses jurisdiction.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
APR 13 1957
JOHN T. FEY, Clerk

In The

Supreme Court Of The United States

OCTOBER TERM, 1956

No. 240

H. T. ARNOLD,
Petitioner,

vs.

PANHANDLE AND SANTA FE RAILWAY COMPANY,
Respondent.

ON WRIT OF CERTIORARI

BRIEF FOR THE RESPONDENT

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APPENDIX 29

In The

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H. T. ARNOLD,

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ON WRIT OF CERTIORARI

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

QUESTION 1.

Whether the Writ of Certiorari was improvidently granted.

QUESTION 2.

Whether Petitioner was required to be on the gravel driveway while the mail truck was using same.

QUESTION 3.

Whether it is the function of a Court to construe a jury verdict, applying well recognized rules of construction thereto.

QUESTION 4.

Whether the Court of Civil Appeals correctly construed the jury verdict.

STATEMENT

1. Pleadings.

Petitioner's First Amended Original Petition, upon which the case was tried, sued Respondent and R. A. Billings jointly and severally (R. 17-23). Respondent was charged with the following seven grounds of negligence:

"A. In failing to furnish the Plaintiff a reasonably safe place to work.

"B. It failed to warn Plaintiff of the truck in the immediate vicinity where he was working.

"C. It maintained no flagman or person to protect Plaintiff while performing his duties for the railroad.

"D. It failed to furnish and maintain a blue flag for Plaintiff.

"E. It was negligent in that it permitted said truck to be operated in a careless and negligent manner in the vicinity of where Plaintiff was working.

"F. It was negligent in allowing said truck to be driven on an area normally used as a walk way.

"G. In failing to keep a proper lookout for Plaintiff."

The other Defendant, Billings, was charged with negligence in failing to keep a proper lookout, in operating without clear vision, in operating without sufficient rear view mirrors, in operating with faulty brakes, in failing to give horn warnings, in driving backward instead of forward, in driving at excessive speed, in driving on a walk way, in failing to keep the truck under proper control, and in backing the truck alongside the cars upon which Plaintiff was working.

2. Evidence.

By way of correction and supplementation, Respondent adds these facts:

Petitioner arrived at the baggage cars containing mail before the engine cut loose, and before the Billings truck arrived. Petitioner waited for the engine to cut loose, put a blue flag on the south end of the southern baggage car, and went away to do other work in another location before the Billings truck arrived. Some 20 minutes later he returned to the baggage cars, and saw the Billings truck on the driveway, backed up to a baggage car at an angle, then in the process of being loaded with mail. After observing these facts, Petitioner began and continued inspection of the baggage cars (R. 71-72), entering the northern end of the northern baggage car, passing through it and the car next south, then emerging from the middle car to the pressed gravel driveway, moving back and forth on the driveway between the second and third baggage

cars, during which operations he several times observed the Billings truck, and finally he turned his back toward the truck and began walking southward at a slow speed, and after having taken only a few steps was struck by the truck (R. 30-31).

Petitioner was senior car inspector at Lubbock, having worked about 29 years, and more or less selected his own job (R. 62).

Just east and immediately south of the passenger station at Lubbock, Texas, an old clay or caliche improvised passenger way or platform (R. 62, 145) next adjacent the westernmost railroad track at the station, had been converted into a pressed gravel hard-surface driveway for the use of Billings' truck to come alongside baggage cars located on said track to load and unload United States mail, and it was this truck that struck Petitioner (R. 153). That gravel driveway had been used daily by Billings' truck since it was constructed in December, 1950 (R. 145). The driveway was 8' 10" wide (R. 36), and immediately west of it there was a small grass plot or park upon which employees could stand or walk (R. 156), and the driveway had not been used by passengers since it was constructed (R. 150). The driveway was not wide enough to be occupied by a pedestrian and the moving mail truck at the same time and at the same location (R. 149, 150, 152).

Mail cars are brought in on this same track each morning and are unloaded, and during the day they are reloaded with mail and are not moved out until late in the afternoon (R. 156).

Culwell, Arnold's immediate superior, testified that it would take no more than 15 minutes to inspect the three baggage cars (R. 175); that there is no special time for inspecting these cars during the day; that Arnold had other work to do and should not have been working on these cars and occupying the driveway when the truck was on the driveway unloading the cars and moving on the driveway (R. 181).

There is no testimony in the entire record that it was Arnold's duty to inspect the cars or be on the pressed gravel driveway while the truck was there, and there is no testimony in the entire record that Arnold ever inspected these baggage cars on any prior occasion while the truck was standing or moving on the driveway.

3. The Court's Charge and the Jury's Verdict.

Without defining "reasonably safe place to work" (R. 310), despite Respondent's objection that such term or expression should be defined (R. 297), the Court inquired, and responsive thereto the jury found, that Respondent negligently failed to furnish Arnold a reasonably safe place to work (R. 310). The jury also found that Respondent's failure to warn Arnold of the approaching truck was not negligence (R. 311); that Respondent was not negligent in permitting the truck to use the area which Arnold was using (R. 312); that Respondent did not fail to keep a proper lookout for Arnold (R. 313); that Billings' truck driver did not fail to keep a proper lookout for Arnold (R. 313); that the truck driver's failure to give adequate warning before backing the truck was not negligence (R. 314); that it was not negligence to back the truck rather than drive it forward (R. 315); that the truck

was not backed too close to the baggage cars (R. 316); that the truck was not backed too fast (R. 317); that operating the truck without clear vision in the direction of movement was not negligence (R. 317); that Arnold did not move into the path of the truck *when his movement could not be made with safety* (R. 318); and that Arnold's failure to keep a proper lookout (the term having been properly defined) was a proximate cause of his injuries (R. 319).

Both parties moved for judgment *upon the verdict*, and the trial court rendered judgment for Petitioner (R. 340, 344, 344-352).

4. The Rulings of the Court of Civil Appeals and the Supreme Court of Texas.

The Court of Civil Appeals, recognizing that

> "The trial of the cause was conducted under the provisions of the federal law expressed in the act and decisions thereunder and it is recognized that the appeal must be determined by the same law. Florence J. Bailey v. Central Vermont Railway, Inc., 319 U. S. 350; Strickland Transp. Co. Inc. vs. Johnston, et al, 238 S.W. (2) 717" (R. 355),

construed the jury verdict and concluded that the proper judgment to be rendered thereon should have been for Respondent. It reasoned that when the verdict is viewed and construed as a whole, in connection with the pleadings, the evidence, and the manner in which the issues were submitted, since the only claim or intimation that the place of work was unsafe was because of the presence and movement of the Billings truck on the gravel driveway, and since the jury had absolved Respondent from any

dereliction in letting the truck use the area, or in not taking any of the claimed special precautions for protecting Arnold against the truck, and had absolved Billings from any of the derelictions charged against him, there was nothing remaining to support the jury's finding of failure to furnish "a reasonably safe place to work". The Court said:

> "If Appellee (Arnold) was not furnished a safe place to work by Appellant (Respondent), it was solely by reason of the fact that the truck of Billings was permitted in the area" . . . "Since the *jury found* that . . . (Respondent) was not negligent . . . in permitting motor trucks on an area used by . . . Arnold in the performance of his work, Appellant (Respondent) was entitled to judgment in the trial court *on such verdict.*" . . . "If the railway was not negligent in permitting the motor truck in the area, *then it necessarily follows that it did not fail to furnish* . . . (Arnold) . . . *a reasonably safe place in which to do his work.*" . . . "In any event, *under the jury finding,* no negligence could attach to . . . (Respondent) . . . by reason of the truck being in the area and the alleged consequent failure of . . . (Respondent) . . . to furnish . . . (Arnold) . . . a safe place to work." (emphasis supplied).

The Court then said that since the general finding of unsafe place to work had been undermined, negatived and completely destroyed by the specific jury findings exhausting the entire concept of unsafe place as developed on this record, the general finding of unsafe place was eliminated as a basis for judgment, and the specific findings were the proper basis for judgment.

The Supreme Court of Texas refused the Application for Writ of Error. (R. 392).

SUMMARY OF ARGUMENT

1. If this were a "no evidence" case, as it has been erroneously treated by Petitioner, Respondent would agree with Mr. Justice Frankfurter's able and elaborate dissent in the series of cases of *James C. Rogers*, and others, printed at pages 520-539 of the March 11, 1957 Advance Sheet, 1 L. Ed.2d, No .7, and believes that this Court should not have accepted the case, but should have denied the writ as it did in *Armstrong v. Missouri-Kansas-Texas R. Co.*, Tex. Civ. App. 233 S.W. (2) 942, writ of error dis. n.r.e. cer. den. 314 U. S. 837, and numerous other cases. The Courts below have fully recognized that the principles pronounced by this Court to guide the trial and disposition of cases arising under the Federal Employers Liability Act govern and control, and have earnestly endeavored to properly apply those principles here. The only matter at issue is the proper ownership of $18,000, and that is of interest only to the parties immediately involved.

But this is not a "no evidence" case. The case was completely tried to a jury, both parties moved for judgment *on the jury verdict*, and the Court of Civil Appeals has rendered judgment for Respondent *on the verdict*. Petitioner has miscast and misclassified the case in his petition as a "no evidence" case, and Respondent believes that this Court was thereby misled into granting the writ, and upon fuller consideration and reflection, it would appear that, in the language of Mr. Justice Harlan's concurring opinion in *Rogers*, we have here "considerations appearing which were not manifest or fully apprehended at the time certiorari was granted," so that the "rule of four"

should not obstruct a present dismissal of the writ as having been improvidently granted.

2. Respondent did not "furnish" the pressed gravel driveway to Petitioner to perform car inspecting work thereon while the Billings truck was using said driveway, but Petitioner, of his own volition, voluntarily and erroneously selected said place of work at a time and under temporary circumstances when the only conceivable cause of "unsafe place" existed.

3. A Court must construe a jury verdict, and by applying well recognized rules of construction, it must endeavor to reconcile any conflicts or superficial inconsistencies therein by construing the verdict as a whole, in the light of the pleadings, the evidence, and the manner in which the issues were submitted. That is all the Court of Civil Appeals has done.

4. The Court of Civil Appeals has properly construed the jury's verdict and has rendered judgment thereon for the proper party, and if this Court reaches the merits of this case, the judgment of the Court of Civil Appeals should be affirmed. There is no evidence of "unsafe place" except the presence and movement of the Billings truck. If "unsafe place" should be construed to embrace some imaginary thing other than the presence and movement of the truck, "unsafe place" as so defined could not possibly be a cause "in whole or in part" of Petitioner's injuries because it was the truck and the truck only that injured Petitioner.

ARGUMENT

POINT ONE

THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS HAVING BEEN IMPROVIDENTLY GRANTED.

Basically, the only question in this case is the ownership of $18,000.00. That is of interest to the immediate parties only. All the lower courts have recognized that the case arose under the Federal Employers' Liability Act and was required to be tried and decided agreeably to the principles announced and applied by this Court in such cases. There is not a single expression in the opinion of the Court of Civil Appeals which indicates any reluctance or objection on the part of that Court to follow the principles laid down by this Court for guidance in the decision of such cases, but to the contrary, its opinion evidences an earnest effort to follow those principles. A full and complete jury trial was had. Every issue that Petitioner requested was submitted, many of them over the objections of Respondent (R. 295-307). All submitted issues were answered by the jury. Both parties moved for judgment *upon the verdict.* (R. 340-344). These motions required the trial court to construe the verdict and determine which party was entitled to judgment, and it endeavored to perform that function, but there was no occasion for the Court to construe the admittedly applicable Federal Act, and that was not done. The trial court construed the verdict to entitle Petioner to judgment. The Court of Civil Appeals, affirmatively recognized that the case was tried, and "the appeal must be determined" agreeably to the holdings of this Court, and not in contravention or

derogation thereof; and it and the Supreme Court of Texas disagreed with the trial court and decided that the jury verdict, construed as a whole, in the light of the pleadings, the evidence, and the manner in which the issues were submitted, entitled Respondent to judgment *on the verdict*. That is all that has been decided. Respondent believes that the denial of certiorari by this Court in the wholly comparable "construction of verdict" cases, such as *Benson v. Missouri-Kansas-Texas R. Co.*, Tex. Civ. App., 200 S.W. 2d 233, cer. den. 332 U. S. 830, and *Missouri-Kansas-Texas R. Co. v. Roberts*, Tex. Civ. App. 225 SW (2) 198, writ of er. ref., n.r.e., cer. den. 340 U. S. 832, rehearing den. 340 U. S. 885, are the proper precedents to follow.

Petitioner in his Petition for Ceriorari, and again in his Brief, misconstrues and miscasts this case as a "no evidence" case, and cites "no evidence" cases in claimed support of his contentions. But this is clearly not a "no evidence" case, and the authorities cited and discussed by Petitioner are not in point. Petitioner does not attempt to distinguish the *Benson* and *Roberts* cases, *supra*. This Court held in *Pardee v. Aldridge*, 189 U. S. 429, that when a general jury finding is completely negatived by specific jury findings, the general finding must be disregarded, and the specific findings control. That is all that has been ruled in this case, and the ruling is consistent with the rulings made by this Court. The judgment of the Court of Civil Appeals is *on the verdict*, not in disregard of the verdict. The Court of Civil Appeals did not hold that there was "no evidence" supporting the general concept of "unsafe place to work".

It held that the evidence of "unsafe place to work" consisted only of the presence and operation of the

Billings truck upon the pressed gravel driveway, and since the jury's findings have absolved Respondent of responsibility for these specifically, *then there was no other remaining evidence or inference of unsafe place.*

Respondent respectfully submits that the proper casting of this case in its true classification must have been "not manifest or fully apprehended at the time certiorari was granted, and that the application should now be dismissed as having been improvidently granted, and that such action would not be inconsistent with or in derogation of 'rule of four'."

POINT TWO

RESPONDENT DID NOT FURNISH, BUT PETITIONER VOLUNTARILY AND ERRONEOUSLY CHOSE, TO BE UPON THE PRESSED GRAVEL DRIVEWAY WHILE THE BILLINGS TRUCK WAS UPON AND MOVING UPON THAT DRIVEWAY.

Respondent seasonably objected to Special Issue No. 1, submitting unsafe place to work, and supporting Issues 2 and 3, on various grounds, including failure to define the term, and failure to limit and restrict it as to time and place, and as being too general (R. 296-297), but the Court overruled these objections and the issues were submitted (R. 310).

Respondent has set out under "Evidence", *supra*, with appropriate record references, the major portion of the undisputed testimony which shows that Respondent did not "furnish" to Petitioner the baggage cars and the ad-

jacent pressed gravel driveway upon which to work while Billings' truck stood and moved thereon in the loading and unloading and transportation of mail, and that testimony, together with some additional, will be re-stated briefly in this Argument to give a clear over-all picture.

Billings had a contract with the Post Office Department to transport mail between the post office and Respondent's baggage cars, and to load and unload mail into and from such cars. The law requires Respondent to transport the mails, and pursuant to Respondent's duty to afford a way of ingress and egress to said cars, in December, 1950, Respondent constructed a pressed gravel driveway 10' 8" wide, straight, level, and hard-surfaced, along the west side of and adjacent to its westernmost track at the station in Lubbock (Exhibits R. 288A-288B), upon which mail cars were daily placed, to permit Billings' truck to come alongside said cars. This area was not used by passengers. The truck was instructed to enter and leave the premises from the south end of said driveway (R. 158), and since no room was provided for turning the truck, if the truck headed in, it had to back out (R. 146-147). Petitioner had seen this truck head in and back out on many prior occasions (R. 64). No trucks were permitted on the pressed gravel driveway except Billings' truck (R. 150). The station agent, in charge of the area, testified that he would not expect a man and a truck to occupy the driveway at the same time (R. 149) because it was not wide enough for both to occupy it at the same time and at the same location, and if both were using it at the same time, one would have to give way to the other (R. 149-150). There was a grass plot, or small park, adjacent to the gravel driveway on the west, upon which employees could stand or walk (R. 156).

Petitioner was the senior car inspector at Lubbock with many years' experience, and he pretty well chose his own jobs. On the morning of his injury he came to the location of three baggage cars standing on the aforesaid track, before the engine cut loose from the cars, and before the Billings truck had arrived. After the engine cut loose and before the Billings truck arrived, Petitioner placed a blue flag on the South end of the South car and then went on to another location to do other work (R. 72), the flag meaning that the cars were not to be coupled into or switched until the flag was removed (R. 177). After attending some work at another location, some twenty minutes later Petitioner returned to the three baggage cars and found Billings' truck on the pressed gravel driveway, headed generally North but cut back at an angle so as to make its open rear end more accessible to the loading of mail from the baggage car into the truck. He found railway employees in a baggage car loading mail into the truck, and he found Billings' driver on the bed of the truck with the mail then piled so high as to block the view through the rear cab window (R. 32). Having made these observations, Petitioner entered the North end of the Northernmost car, walked through the two most Northern cars, alighted onto the pressed gravel driveway from the West door of the second car, and several times observed the Billings truck while he was on the driveway, and while he did some external work alongside the second and third cars. He then turned his back to the truck and started walking slowly Southward in the driveway, and after taking a few steps, he was struck by the backing truck, which had not sounded a horn, and was knocked down and injured.

The baggage cars arrive in the morning and remain there for reloading of mail until late in the afternoon (R. 156).

Petitioner's immediate superior testified that it would have taken Petitioner about fifteen minutes to inspect these three baggage cars (R. 175); that there was no particular time to inspect them; that Petitioner had other work to do; that it was not his duty to inspect the cars and be on he pressed gravel driveway while Billings' truck was standing or moving thereon, and that Petitioner should have performed other work while the truck was there.

It was a clear day, visibility was good (R. 43), and injury was sustained shortly before 10:00 A.M.

There is no testimony in the entire record from Petitioner or any one else, that Petitioner had on this or any other occasion, been instructed to work on or about the driveway while the truck was occupying the same, or that Petitioner even thought such to be his duty; and there is no testimony from Petitioner that he had ever inspected cars and worked upon the driveway while Billings' truck occupied the same.

Respondent submits that the above recited statement from the Record in this case shows that Petitioner had no duty to be on the pressed gravel driveway at the time he was hurt; that is, at the time the truck was occupying the driveway; that he voluntarily chose to be at that location at that time, and that his choice was a mistake, wholly unexplained and unjustified by him; and that there was and is no suggestion of any other unsafe feature about the cars or the driveway other than the presence and movement of Billings' truck. This makes abundantly clear that Issue No. 1 was vulnerable to all the objections addressed

to it by Respondent, and should not have been submitted over said objections. It did not fit the situation, which had been developed by the testimony. The specific issues did fit the situation, and they completely exhausted the entire concept of "unsafe place to work," as developed in the pleadings and evidence in this case. Respondent did not "furnish"; Petitioner *chose of his own volition.* The truck had precedence there. Petitioner should have been elsewhere.

The various findings of the jury show that this was the jury's view. How else could the jury so consistently have found that railway owed Petitioner no duty to warn him of the approaching truck; owed Petitioner no duty to keep the truck off the driveway; owed Petitioner no duty to keep a lookout for him; that Billings' driver owed him no duty to keep a lookout for him, owed him no duty to give a warning of the backing truck, owed him no duty not to back; owed him no duty to back a certain distance from the cars; owed him no duty to back at a slow speed; owed him no duty to have clear vision before backing; and how could the jury have found that Petitioner's failure to keep a proper lookout for his own safety caused his injuries (R. 310-320) — unless the jury had concluded that Billings' truck had exclusive rights on the driveway at the time, and that Petitioner was in the wrong place at that time at his peril? Is it not allowable for the jury to adopt this view upon the undisputed state of the record which Respondent has just set forth? How can Petitioner contend to the contrary when he has not challenged a single one of the jury findings hereinabove set forth?

Respondent did not furnish the place for Petitioner to work at that particular time and under those circumstances. Petitioner voluntarily chose the place.

POINT THREE

A COURT MUST CONSTRUE A JURY VERDICT.

Respondent has set forth as Appendices at the back of this Brief, the most pertinent of the Texas Rules of Civil Procedure which govern the trial of a case, and define the function and duty of a Court of Civil Appeals upon an appeal from the Trial Court, in the belief that a perusal of them will aid this Court in an understanding of what has been done in this case. It will be observed that in Texas practice the parties may require a submission on special issues – it is not optional with the Judge as it is in Federal practice. The Rules define the character of special issues that are to be submitted, and they allow each of the parties to make their objections to the form and relevancy of the issues, as was done in this case. A careful Texas trial lawyer will insist that the Trial Judge frame his issues with care, and will conform them to opposing objections of generality, vaguenes and duplicity. It is a universal rule in this jurisdiction that a party, as against opposing objection, may not have a double submission of his case; he may not have it submitted both generally and specially – *Fox v. Dallas Hotel Co.*, Sup., 111 Tex. 461; *Sproles v. Rosen*, 126 Tex. 51, Sup., 84 S. W. 2d 101, and if such faulty and duplicitous submission is made, and the specific findings exhaust the entire field or concept embraced in the general submission and are in conflict therewith, the specific findings control and are the sole basis of judgment. *Sproles v. Rosen, supra; Aranda v. Texas & N. O. Ry. Co.*, Tex. Civ. App., 140 S. W. 2d, 236, error dis. Judgment correct; *Harbin v. City of Beaumont*, Tex. Civ. App., 146 S. W. 2d 297, error dis., Judgment correct. These rules of construction are in harmony with rules of construction ap-

plied by this Court. In *Pardee v. Aldridge,* 189 U. S. 429, Mr. Justice Holmes, speaking for a unanimous Court, said:

> "• • • and as the findings dealt with pure matters of fact, which it was the province of the jury to determine, so far as there was a conflict between them and those which were made under instructions, those *which expressed the free judgment of the jury would prevail.*" (Emphasis ours).

In *New Orleans Insurance Association v. Piaggio,* 83 U. S. 378, 21 L. Ed. 358, this Court said:

> "Courts also in the trial of the issues of fact often propound questions to a jury and *the rule is well settled that such a special finding even when it is inconsistent with the general verdict shall control in determining what judgment should be rendered in the case.*" (Emphasis ours).

They are also in harmony with Rule 49 of the Federal Rules of Civil Procedure. See appendix for Rule 49, Fed-ederal Rules. That is the rule of construction which the Trial Court in this case failed to apply, and it then became the duty of the Court of Civil Appeals to apply that rule, make the proper construction, and render the proper judgment. That is what the Court of Civil Appeals has done, and that is all it has done.

The verdict is required to be construed as a whole, in the light of the pleadings, the evidence, and the manner in which the issues are submitted, and all conflicts and inconsistencies must be reconciled if reasonably possible, to the end of giving effect to the jury's true finding and avoiding a second trial. *Ford v. Carpenter,* Sup., 147 Tex.

447; *Benson v. Missouri-Kansas-Texas R. Co.*, Tex. Civ. App., 200 S. W. 2d 233, error ref., n.r.e., cert. den. 322 U. S. 830; *Pardee v. Aldridge*, 189 U. S. 429.

The Court of Civil Appeals performed its bounden duty in construing the verdict. That was the only question before the Court. Respondent, as Appellant, did not seek a reversal and remand, even in the alternative, but sought only a judgment of reversal and rendition upon the verdict.

POINT FOUR

THE COURT OF CIVIL APPEALS HAS CORRECTLY CONSTRUED THE JURY VERDICT.

Under "Pleadings," supra, Respondent has set out verbatim the allegations of negligence charged against it. It will be observed that each and all of them center upon and pertain to the presence and operation of Billings' truck which struck and injured Petitioner upon a pressed gravel driveway where it was found by the jury to be authorized to operate. The pleading may be searched in vain for any claim of fact, condition, or circumstance evidencing "unsafe place" in any way or manner except the presence and the movement of the truck on the driveway. The gravamen of the complaint is that the truck was wrongfully allowed by Respondent to be upon the area, and because of that alleged wrong, it is claimed that Respondent owed Petitioner such special care as lookout, warning, and other protections against the alleged dangers of the truck.

When the testimony was heard, it was established (R. 233) that the owner of the truck had a contract with the

Post Office Department to load and unload mail into and from Respondent's baggage cars and transport it to and from the Post Office; that the mail cars were always spotted on Respondent's Westernmost track at the station in Lubbock, Texas; that West of this track and next adjacent thereto, and between the track and a grass plot or park, Respondent constructed this pressed gravel driveway ten feet and eight inches wide, straight, level, smooth and hard like pavement, for the use of this particular truck, to provide access to and exit from the mail cars. The driveway was constructed in December, 1950, had been used daily by the truck in this manner to Petitioner's knowledge, and had not been used by passengers. (R. 145).

Upon this evidence, if the jury was not required to find, certainly it was allowable for it to find, that Respondent was not negligent (Special Issue No. 8, R. 312) "in permitting such use" by the truck. And the undisputed evidence having shown that there was no particular time when these cars had to be inspected; that it took only fifteen minutes to inspect them; that they remained in the same location available for inspection from about mid-morning until late in the afternoon; that the Petitioner was senior man who somewhat picked his jobs, who had other duties to perform, who was not required or expected to occupy the driveway while the truck was using the same; that there was a conveniently adjacent grass plot or parkway upon which he could have stood or walked, next adjacent to the driveway on the West — if the jury was not required to find, certainly it was allowable for it to find, that Respondent did not owe Petitioner any special duty of protection against the hazards of the truck rightfully upon the driveway; that Billings did not owe him any special

care of warning or lookout; and that he, himself, proximately produced his own injury by negligently failing to keep a proper lookout.

Respondent asserts that these specific jury findings, made responsive to issues submitted by Petitioner, are well grounded in and supported by the evidence, and are logical and consistent. They are specific findings of fact, which is the jury's true province.

But then the jury found that the place to work "furninshed" by Respondent, was not "reasonably safe." As previously stated, the Trial Court would not say, over objection, either by definition, instruction or proper limitation as to time and place, what was meant, or what was really inquired about, in this issue.

Now, if we turn to the evidence, including the photographs (R. 288A-288B), we will find that the driveway next adjacent the track was straight, level, smooth (R. 28-29), composed of pressed gravel, "hard as this floor here" (R. 36), which might "be compared to pavement" (R. 28), ten feet eight inches wide, upon which Petitioner had walked and worked in complete safety on this very morning until he was struck and injured by the truck. How, where, or wherein, and in what manner, was the place of work, even if "furnished" by Respondent, not "reasonably safe"? It was a clear day, and there was nothing to impede visibility.

The evidence may be searched in vain for the slightest suggestion of any fact, condition, or circumstance, which would be an allowable basis for an inference to be drawn of unsafe place to work, except for the presence and movement of the truck.

But the jury has found that Respondent was not negligent in permitting the truck to be on the driveway, was not negligent in failing to give Petitioner special protection of warning and lookout against the dangers of the truck, and that Billings owed Petitioner no special care, and that Petitioner had proximately caused his own injury by failing to keep a proper lookout.

Now Petitioner says in his Brief (P. 13) that it was his duty to inspect these cars. Respondent agrees. But Petitioner does not say, nor does the evidence show, that it was his duty to inspect them at this time, under the circumstances and conditions then existing. We have reviewed the record under Point Two and shown that it was not his duty to do so at that time.

Petitioner then says in his Brief (P. 14) that the Court of Civil Appeals held that the jury's findings of "unsafe place" was a conclusion of law, without factual support, and he then goes on to concede that the real holding of the Court is (P. 14) "that there was no basis in the facts found to support a judgment." That there was no basis in the *facts found* is truly what the Court did hold. It did not at any time, or at any place, hold that there was no evidence upon which the jury could have found affirmatively upon the general issue of "unsafe place," if that had been the sole issue submitted in that field of liability. It did hold that what the jury found responsive to specific fact issues, contrary to its general conclusion of unsafe place, when the verdict is construed as a whole in the light of the pleadings, the evidence, and the manner in which the issues were submitted, completely undermined, destroyed and negatived the jury's general finding of "unsafe place."

Petitioner in his brief (P. 17-22) says that in Federal Employer Liability Act Cases, issues must be "standardized"; that "unsafe place to work is an ultimate issue"; and that the Court of Civil Appeals in casting aside the finding upon "unsafe place" as a "conclusion of law" has invaded the province of the jury. As to standardization, Respondent answers that the issues must be drawn pursuant to the Rules and Practice of the forum. See *John v. Paullin*, 231 U. S. 583, 58 L. Ed. 381. As to "ultimate issue," Respondent agrees that if unobjected to, and if not followed by a duplicate submission of specific inquiries in the same field, an issue inquiring of unsafe place is an ultimate issue. But Petitioner ignores the objections made to the issue and ignores the double submission he brought about by tendering the general submission and the specific issues embracing the entire general concept as shown and developed in this case. Petitioner cites quite a few Federal cases wherein a general finding of unsafe place, not even under attack, was generally sustained by the Court, but not one of the cases cited by him involves a general finding as well as contrary specific findings which exhaust the entire concept embraced in the general finding, as developed by the Record in the particular case.

Petitioner's claim that an issue of "unsafe place" is an ultimate issue, irrespective of the pleadings, the evidence, the opposing objections, and without regard to being being raised by both the pleadings and the evidence, and without regard to having been submitted exhaustively at Petitioner's request in specific issues, ignores all Texas Rules of Civil Procedure, all of Texas Procedural Case Law, and all State and Federal cases pertaining to the construction of a jury verdict, and the decisions of this

Court in the cases already cited. Respondent repeats, Petitioner has cited no case holding to the contrary.

Petitioner argues (P. 23) that the specific findings of no negligence in allowing the truck to be on the driveway, no negligence in failing to warn, and no negligence in failing to keep a lookout for him, "have no connection with the issue concerning unsafe place, and certainly have little, if any, bearing on the jury's answer to the issue concerning safe place and the evidence in support of such finding," but on page 30, Petitioner concedes that these three specific findings are "three evidentiary elements" of unsafe place. But Petitioner wholly fails to point out what other elements of unsafe place are shown in this Record. Petitioner fails to point out upon what other fact, circumstance or condition found in this record, the finding of unsafe place could rest. Since there is no other evidence of record evidencing unsafe place, Petitioner's argument that these specific inquiries are not in the field of unsafe place, brings him square against the universal rule that no issue will be submitted unless it is raised by some evidence. Petitioner continues to argue (P. 23-24) that he was not relying upon the facts inquired about in the specific issues to support the issue of "unsafe place," and says (P. 24): "The evidence in support of the jury's finding that Respondent failed to furnish Petitioner a safe place to work is fully set forth in the Statement herein," but the Statement may be searched in vain for any recited fact, circumstance, or condition, which suggests unsafe place about either the cars or the driveway *other than the presence and movement of the truck*, which the jury has said was rightfully there and not negligently operated. It was the truck and the truck only that knocked Petitioner down and injured him.

Petitioner then says he will (P. 24) "again point out certain salient points of evidence in this record" to show unsafe place, and he proceeds to set out that the driveway was smooth and level. He says (P. 24-25) that it was "too narrow to be occupied by the mail truck and Petitioner at the same time," but he does not say that a ten foot eight inch wide driveway was too narrow for Petitioner alone.

Petitioner unfairly treats the opinion of the Court of Civil Appeals when he says (P. 27) that that Court held that the general finding of unsafe place has "no factual support." As previously pointed out, it made no such holding. It ruled that such general finding "has no support in the (specific) facts found" (R. 358).

Petitioner says (P. 30-31) that the jury, in finding unsafe place, had a right to consider "the over-all scope of the construction, maintenance, control, and instructed use by the railway of its premises, the nature of the tasks involved, the hazards entailed, such as footing, clearance, or lack of space on the one-way passageway." Where is any evidence in this record, even remotely suggesting improper or negligent "construction, maintenance, control"? There is none. What were the "hazards entailed" except the presence and movement of the truck? There were none. What was wrong with "footing," shown to have been pressed gravel, hard, level, and smooth like a floor or pavement? There is nothing to suggest faulty footing, but Petitioner's own testimony refutes it.

Petitioner argues that the jury is entitled to speculate. Indeed, under the rulings of this Court, where the testimony is in conflict, or where different inferences may be drawn from the same testimony, the jury is allowed to speculate, and draw the inference or conclusion which it

thinks most reasonable. But Petitioner cites no case which holds that the jury can speculate without some fact basis as a field in which to "speculate" in the sense of "suppose," "imagine," "wish," or "dream".

But if Petitioner's argument that "unsafe place" may be supported by some "imaginary" or "supposed" fact, circumstance, or condition, wholly unrelated to the presence and movement of the truck, should be adopted, Petitioner's position would be no better, because such other "supposed" or "imaginary" thing could not possibly be the cause, "in whole or in part" of Petitioner's injuries. It was the truck, and the truck only that knocked Petitioner down and injured him. According to Petitioner's own testimony, as he walked along on the driveway, the first and only disturbance or interference with his comfort and safety perceived by him, was the truck's striking him off the ground and propelling him through the air, causing him to fall prone, face downward on the driveway, and running its dual wheel over him before he could right himself or crawl out of its path. There was no other cause "in whole or in part" of Petitoner's injuries except the truck.

It would seem that Petitioner's argument that the Texas Rules of Civil Procedure should not apply in a Federal Employers' Liability Act case, and that while a Court might construe a jury verdict in an ordinary negligence case, it may not do so in a Federal Employers' Liability Act case, scarcely requires answer. The Texas Rules of Civil Procedure were promulgated by the Supreme Court of Texas pursuant to Article V, Section 25, of the State Constitution (Vernon's Constitution of the State of Texas, page 321), and a special Act of the Legislature (Art. 1731a, V.A.C.S.), with the advice and counsel of a large

committee of the ablest lawyers and Judges of Texas (Vernon's Annotated Texas Rules, Pages XXIII-XXV). They are designed to govern all civil trials in the Courts of Texas. Their purpose is to guarantee a fair trial to plaintiff and defendant. They are not designed to guarantee victory to either side.

Respondent submits that the Court of Civil Appeals' construction of the jury verdict is obviously correct, and that its judgment is likewise correct.

CONCLUSION

Petitioner first submits that the writ of certiorari should be dismissed as having been improvidently granted, and then submits, that if the case is examined on its merits, it will be found that the Court of Civil Appeals has correctly construed the jury verdict, has rendered judgment for the right party, and its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Preston Shirley, one of the attorneys for Respondent, Panhandle and Santa Fe Railway Company, and a member of the bar of the Supreme Court of the United States, do hereby certify that Petitioner, H. T. Arnold, was served with copies of Respondent's Brief in accordance with Rule 41 by depositing copies of such brief in the United States Post Office at Lubbock, Texas, first-class, postage prepaid, addressed to counsel of record for Petitioner, Henry D. Akin, Jr., 505 North Ervay, Dallas 1, Texas, and J. O. Bean, 10th Floor, Gulf States Building, Dallas, Texas, sending two copies of such brief to each of them on the 12th day of April, 1957, in accordance with Sections 1 and 3(b) of Rule 33 of the Revised Rules of the Supreme Court of the United States.

Preston Shirley

Preston Shirley
Counsel of Record for Respondent

APPENDIX

RULE 271, TEXAS RULES OF CIVIL PROCEDURE

Charge To The Jury

Unless expressly waived by the parties, the judge shall prepare and in open court deliver a written charge to the jury. If the case is submitted on a general charge, he shall instruct the jury on the law applicable to the case. If the case is submitted on special issues, he shall submit the issues of fact to the jury.

RULE 272, TEXAS RULES OF CIVIL PROCEDURE

Requisites

The charge shall be in writing, signed by the judge, and filed with the clerk, and shall be a part of the record of the cause. It shall be prepared after the evidence has been concluded and shall be submitted to the respective parties or their attorneys for inspection, and a reasonable time given them in which to examine and present objections thereto, which objections shall in every instance be presented to the court in writing before the charge is read to the jury, and all objections not so made and presented shall be considered as waived. When written objections have been so made and presented, if the court overrules same, he shall endorse his ruling thereon and sign the same officially, and when the same is so endorsed, it shall constitute a sufficient bill of exception to the ruling of the court thereon, and when so endorsed by the judge it shall be presumed, unless otherwise noted thereon, that the party making such objections presented the same at the proper time and excepted to the ruling thereon. The re-

quirement that the objections to the court's charge shall be in writing will be sufficiently complied with if such objections are dictated to the court reporter in the presence of and with the consent of the court and opposing counsel, before the reading of the court's charge to the jury, and are subsequently transcribed and the court's ruling and official signature endorsed thereon and filed with the clerk in time to be included in the transcript. Failure of the court to give reasonable time to the parties or their attorneys for examination of the charge shall be reviewable upon appeal upon proper exception. The judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence, and so as to instruct the jury as to the law arising on the facts, and shall only submit controverted questions of fact. Amended by order of September 20, 1941, effective December 31, 1941.

RULE 274, TEXAS RULES OF CIVIL PROCEDURE

Objections and Requests

A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. Any complaint as to an instruction, issue, definition or explanatory instruction, on account of any defect, omission, or fault in pleading, shall be deemed waived unless specifically included in the objections. Where the objection made by the complaining party, or an instruction, issue, definition, or explanatory instruction requested by him, is in the opinion of the appellate court obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such

objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. Amended by order of September 20, 1941, effective December 31, 1941.

RULE 277, TEXAS RULES OF CIVIL PROCEDURE

Special Issues

"In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the Court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided, that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanetly or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to

properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge. If the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this rule shall be construed in connection with the succeeding rule. Amended by order of March 31, 1941.

RULE 279, TEXAS RULES OF CIVIL PROCEDURE

Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party.

Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or expanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

RULE 301, TEXAS RULES OF CIVIL PROCEDURE

Judgments

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief

to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

RULE 434, TEXAS RULES OF CIVIL PROCEDURE

If Judgment Reversed

When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial.

Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appear to the court that the error affects a part only of the

matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

Provided, second, that if the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the Court of Civil Appeals, and be such as may be corrected by the Judge of the trial court, then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the Court of Civil Appeals shall proceed as if such erroneous action or failure to act had not occurred. Amended by Order of March 31, 1941.

RULE 49, FEDERAL RULES OF CIVIL PROCEDURE

Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission

to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The Court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

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In The

Supreme Court of the United States

OCTOBER TERM, 1956

No. 240

H. T. ARNOLD,

Petitioner,

vs.

PANHANDLE AND SANTA FE RAILWAY COMPANY,

Respondent.

RESPONDENT'S MOTION FOR REHEARING

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RESPONDENT'S MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent respectfully moves for a rehearing in this case.

I.

Prior to the trial of this case in November, 1954, this Court had fully expounded the Federal Employers' Liability Act and had announced a consistent line of principles and shown how they were to be applied to specific facts, for guidance of the lower courts, as evidenced by the following:

Tiller vs. Atlantic Coast Lines, 318 U. S. 54 (1943):

Mr. Justice Black, writing for the Court:

"In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done".

Mr. Justice Frankfurter concurring:

"But the 1939 Amendment left intact the foundation of the carrier's liability — negligence."

Brady vs. Southern R. Co., 320 U. S. 476, (1943):

Mr. Justic Reed speaking for the Court:

"Liability arises from negligence, not from injury under this Act. And the negligence must be the cause of the injury . . . The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

"The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of facts — in this case, the jury".

Mr. Justice Black, writing in dissent:

"Surely this rail was the 'proximate cause' if those words be used to mean an event which contributes to produce a result, which is the meaning Congress intended . . ."

Tennant vs. Peoria & P. U. R. Co., 321 U. S. 29, 88 L.Ed. 520 (1944):

Mr. Justice Murphy, speaking for the Court:

"Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred . . . The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. Galloway v. United States, 319 U. S. 372, 395, 87 L. Ed. 1458, 1473, 63 S. Ct. 1077; Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 74 L. Ed. 896, 50 S. Ct. 281."

Ellis vs. Union P. R. Co., 329 U. S. 649 (1947):

Mr. Justice Douglass, speaking for a unanimous Court:

"The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury."

Wilkerson vs. McCarthy, 336 U. S. 53 (1949):

Mr. Justice Black, speaking for the Court:

" . . . the Act imposes liability only for negligent injuries".

Mr. Justice Douglass concurring:

" . . . the Act did not make the employer an insurer

The liability which it imposed was the liability for negligence." . . .

"The basis of liability under the Act is and remains negligence. Judges will not always agree as to what facts are necessary to establish negiligence."

Urie vs. Thompson, 337 U. S. 163 (1949):

Mr. Justice Rutledge, speaking for the Court:

"We recognize, with Respondent, that the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms."

Moore vs. C. & O. Ry, Co., 340 U. S. 573 (1953):

Mr. Justice Minton, speaking for the Court:

"To recover under the Act, it was incumbent upon petitioner to prove negligence of Respondent which caused the fatal accident."

Stone vs. N. Y. C. L. & St. L. R. Co., 344 U. S. 407 (1953):

Mr. Justice Douglass speaking for the Court:

"The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. Wilkerson v. McCarthy, 336 U. S. 53, 61, 93 L. Ed. 497, 504, 69 S. Ct. 413."

Mr. Justice Frankfurter, speaking in dissent:

"However, the central components of liability for negligence – that it rests upon fault and that appropriate casuality must be established between the negligent circumstances and the complained-of-injury – are the same for actions under the Federal Employers' Act as for any other negligence actions."

In the trial and appellate review of this case, the above stated principles, clearly enunciated by this Court on negligence and proximate causation, were certainly not departed from in any respect, and if there has been departure from those principles in *Schulz vs. Penn. R. Co.*, 350 U. S. 523 (1956) and *Rogers vs. Missouri-Pacific R. Co.*, 352 U. S. 500 (1957), the departure is in strictly "no evidence" cases, whereas this is a "construction of verdict" case, and such departure, if any, having occurred subsequent to the trial and appellate review of this case in Texas, and not changing any principles regarding "jury verdict construction cases", should not warrant the reversal of the judgment of the Court of Civil Appeals.

In granting writs in Federal Employers' Liability Act cases, to review "sufficiency of evidence," this Court has heretofore asserted such laudable purpose as the need to give proper guidance to lower courts, and to bring about uniformity in the construction and application of the Act. As is evidenced by the opinions in *Tiller*, *Brady*, *Tennant*, *Wilkerson*, all supra, and numerous other cases, this Court, in addition to announcing the governing principles, has meticulously recited the facts and circumstances upon which it reasoned that the jury could infer both negligence and proximate causation. Such recitation of the facts and this Court's expressed reasoning on proximate cause did give some guidance to the lower courts to make application of the principles theretofore expounded by this Court.

But in this particular case, Respondent cannot find in the majority opinion any recitation of facts which shows possible causation, or any expressed reasoning process which discloses what error was committed by the Court of Civil Appeals, or which gives any guidance to the lower courts in subsequent cases, and Respondent believes this should be done in aid of the proper administration of the Act.

II.

The Court of Civil Appeals was confronted with the inescapable duty of construing the jury verdict. It construed the jury verdict as a whole, in the light of the pleadings, the evidence, and the way and manner in which the case had been submitted, and in the language of Mr. Justice Holes, in *Pardee vs. Aldridge*, 189 U. S. 429, it gave effect to the specific findings "which expressed the free judgment of the jury".

Respondent respectfully suggests that the opinion of this Court does not construe the jury verdict as a whole, in the light of the pleadings and the evidence, nor does it take into consideration the manner in which the issues were submitted, or the fact that Petitioner's own counsel drafted the issues and guided the manner of submission. As we read the Court's opinion, it merely looks to the evidence alone and makes some general observations about the sufficiency thereof, but without setting forth that evidence, and without showing how the inference the Court draws from the evidence could have been a proximate cause, as this Court has so helpfully done in prior cases. Respondent believes this should be done.

III.

The majority opinion says "The proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury", and that the general finding of unsafe place "has support in the testimony of witnesses justifying the inference that the passageway as used was not a safe place for the petitioner to work while performing his assigned duties". But what are the "proofs", and where is the "testimony", or other evidence, justifying such an inference, other than the presence and movement of the truck, from responsibility for which presence and movement the Respondent was completely absolved by the jury? Respondent cannot find either in this record, and it is assuming that it is still entitled to limit the inquiry and search to what is shown by, and inferable from, this record. It cannot be inferred that the footing was bad, or that the weather was inclement, or that visibility was limited, because the record affirmatively shows to the contrary. It cannot be inferred that there was any negligent conduct on the part of any other fellow employee, constributing to Petioner's injury, because the record is completely silent as to any such fact or circumstance.

But assuming, argumentatively, that there were such "proofs", or such allowable "inferences", where is the causal relation between such proofs and inferences and Petitioner's injury, when it was the truck, and the truck alone, that injured Petitioner? There is no dispute about the cause, and the only cause, of the injury. That proof was made primarily by Petitioner, but it is also fairly supported by every other witness in the case. No inference can be drawn from this record that anything other than the truck caused, "in whole or in part", Petitioner's injury.

It appears to Respondent that it has been cast in this action upon "proofs" which have not been pointed out, which Respondent cannot find, and which Respondent believes cannot be found, and which "proofs", if extant, are affirmatively shown by the record to have had no causal relation to Petitioner's injury.

Since writ has been granted and the case has been heard on its merits, Respondent believes that the case justifies a recital of the facts from which an inference of negligence could be drawn upon this record from any fact or circumstance other than the presence and movement of the truck, for which Respondent has been absolved, and an exposition should be made disclosing any conceivable causal connection between such inferred negligence, if any, and Petitioner's injury. Respondent earnestly believes that any such effort on the part of this Court would surely result in a withdrawal of the present opinion and judgment, and the entering of judgment affirming the judgment of the Court of Civil Appeals. *Herdman vs. Pennsylvania R. Co.*, 352 U. S. 518 (1957).

IV.

What implications are to be drawn from the Court's opinion regarding Texas trial and appellate Rules of Practice in F.E.L.A. cases? May not a Texas Court, in a F.E.L.A. case, as in all other cases, follow its Rules of Practice on issue submission, which are consonant with the Federal Rules; which seek only to limit the jury to its true historic function of finding the facts; and which Rules it applies without fear or favor to plaintiff and defendant alike? A defendant sought the general submission, where specific submissions had been made, in a F.E.L.A. case,

but the Supreme Court of Texas, speaking through its Chief Justice for a unanimous court, said:

> "But a defendant is not entitled to a general submission of contributory negligence when the only issue of contributory negligence raised by the evidence has been submitted specially, as in this case". (*Texas & N. O. R. Co. vs. Hayes*, 293 S.W. 2d, 484 (1956).)

The rule ought to work both ways.

What guidance does the majority opinion of this Court give to the trial courts of Texas?

And wherein did the Court of Civil Appeals err? May it not construe a jury verdict? Did it not follow the universally recognized correct rules of construction? Did it not apply them correctly, and in harmony with the application which was made by this Court in *Pardee vs. Aldridge*, 189 U. S. 429, and *New Orleans Insurance Association vs. Piaggio*, 83 U. S. 378? What guidance does the majority opinion of the Court gives the Court of Civil Appeals in subsequent cases?

CONCLUSION

Believing that the Texas Courts have in no wise departed from the principles announced by this Court prior to judgment and opinion herein; that this Court's Opinion does not expound any error in the judgment and opinion of the Court of Civil Appeals; and that the judgment of that Court is correct; Respondent respectfully asks that a rehearing be granted, that the judgment of the Court of

Civil Appeals be affirmed, and, alternatively, that, at least a clarifying opinion be written which would give guidance to the lower courts on these points:

1. Did either Texas Court depart from the principles theretofore announced by this Court?

2. May a Texas trial court follow its Rules of Practice, and if not, what shall it do?

3. Is there any evidence of "unsafe place" other than the presence and movement of the truck?, and if so,

(a) Of what does it consist?

(b) How did it cause, "in whole or in part", Petitioners' injury?

4. May not a Texas Appellate Court construe a jury verdict in a F.E.L.A. case, and if so, wherein did the Court of Civil Appeals err?

Respectfully submitted,

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CERTIFICATE

I, CHARLES L. COBB, one of counsel of record for Respondent and a member of the Bar of this Honorable Court, do hereby certify that the foregoing Motion for Rehearing is presented in good faith and not for delay, to certify which, witness my hand this 3rd day of June, 1957.

Charles L. Cobb

CHARLES L. COBB
Counsel of Record for Respondent

CERTIFICATE OF SERVICE

I, CHARLES L. COBB, one of the attorneys for Respondent, PANHANDLE & SANTA FE RAILWAY COMPANY, and a member of the Bar of the Supreme Court of the United States, do hereby certify that Petitioner, H. T. ARNOLD, was served with copies of Respondent's Motion for Rehearing in accordance with Rule 58 by depositing copies of such Motion in the United States Post Office at Lubbock, Texas, first-class, postage prepaid, addressed to counsel of record for Petitioner, HENRY D. AKIN, JR., 505 North Ervay, Dallas 1, Texas, and J. O. BEAN, Tenth Floor, Gulf States Building, Dallas, Texas, sending two copies of such Motion to each of them, on the 3rd day of June, 1957, in accordance with Section 1 and 3(b) of Rule 33 of the Revised Rules of the Supreme Court of the United States.

Charles L. Cobb

CHARLES L. COBB
Counsel of Record for Respondent